INDEX

Page

In the United States District Court
Middle District of Tennessee
Nashville Division

illie Lee Henderson,

.

ewis S. Tollett, Warden,
ushy Mountain State Prison

} Civil Action No. 5996

levant Docket Entries ..... A. 2

OCEEDINGS IN FEDERAL COURTS
THIS CASE

der 12-29-70: Clerk to file Petition in
forma pauperis; . Respondent to Show Cause... A. 4

tion for Writ of Habeas Corpus 12-29-70 .... A. 8

pondent's Notice of Filing Documents;
Documents 1 through 7 — 1-18-71 ..... A. 16

pondent's Motion to Dismiss 1-18-71 ..... A. 17

er 2-3-71: Respondent's Motion to
Dismiss, denied; Writ of Habeas Corpus
to Issue ..... A. 18

er 4-12-71: Indictment and all pro-
ceedings based thereupon are void and
of no legal effect; incarceration repugnant
to U. S. Constitution ..... A. 21

ce of Appeal 4-30-71 ..... A. 34

ion, United States Court of Appeals
or the Sixth Circuit, *Henderson v. Tollett*,
59 F.2d 237: 4-20-72 ..... A. 35

r, United States Supreme Court, granting
rtiorari, etc., 10-16-72 ..... A. 36

PROCEEDINGS IN STATE COURTS IN EARLIER HABEAS CORPUS CASE

1. Technical record in Criminal Court of Davidson County (1968) ..... A. 38
2. Bill of Exceptions, Criminal Court of Davidson County (1968) ..... A. 41
3. Exhibits to the Bill of Exceptions:
   Unnumbered Exhibits: Minute entries for Criminal Court of Davidson County, January 5, 1948 (Grand and Petit Jury venire) and February 13, 1948 (Indictment of Henderson) ..... A. 126
   Exhibit 1: Minute entry, Criminal Court of Davidson County, March 12, 1948 (Guilty plea of Henderson) ..... A. 135
   Exhibit 3: Affidavit of Director of Bureau of the Census dated September 9, 1968 ..... A. 138
   Exhibit 4: Minute entry, Criminal Court of Davidson County, May 4, 1953 ..... A. 139
   Exhibit 5: Letter to Whom it May Concern, dated October 22, 1968 ..... A. 142
4. Opinion, Tennessee Court of Criminal Appeals, *State ex rel. Henderson v. Russell*, 459 S.W.2d 176 (Tenn. Cr. App. 1970) ..... A. 143

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-95

LEWIS S. TOLLETT, WARDEN,
Petitioner,

v.

WILLIE LEE HENDERSON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 17, 1972

CERTIORARI GRANTED OCTOBER 16, 1972

In The

UNITED STATES DISTRICT COURT

For the Middle District of Tennessee

Nashville Division

Civil Action No. 5996

WILLIE LEE HENDERSON

v.

LEWIS S. TOLLETT, Warden
Brushy Mountain State Prison

RELEVANT DOCKET ENTRIES

December 29, 1970 Order Entered: Clerk to file petition of Willie Lee Henderson in forma pauperis; Respondent to Show Cause.

December 29, 1970 Filed: Petition for Writ of Habeas Corpus, with Exhibits.

January 18, 1971 Filed: Respondent's Notice of Filing Documents, with Documents #1 through 7.

January 18, 1971 Filed: Respondent's Motion to Dismiss; Memorandum of Points and Authorities in Support of Motion, c/s.

February 3, 1971 Order Entered: Respondent's Motion to Dismiss is Denied; Writ of Habeas Corpus to issue returnable March 2, 1971, 2:00 p.m. Attested copy to R. Jackson Rose, Asst. Atty. Gen., State of Tenn. and to Petitioner Henderson, Brushy Mtn. State Prison, Petros.

Relevant Docket Entries

April 12, 1971 Order Entered: Indictment and all proceedings based thereupon are void and of no legal effect; incarceration repugnant to U. S. Constitution; Petitioner released from custody of respondent. Two att. copies delivered to U. S. Marshal for service upon Warden, Brushy Mountain Prison; att. copies mailed to Petitioner and to R. Jackson Rose, Esquire.

April 30, 1971 Filed: Notice of Appeal filed on behalf of Respondent, c/s.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[fol. 1]

WILLIE LEE HENDERSON

VS.

LEWIS S. TOLLETT, Warden,
Brushy Mountain State Prison

Civil No. 5996

ORDER

(Received for Entry 3:00 P.M., December 29, 1970)

The clerk will file the petition of Willie Lee Henderson for writ of habeas corpus in forma pauperis.

Petitioner alleges that he is presently incarcerated in the Brushy Mountain Prison at Petros, Tennessee, where he is serving a sentence of ninety-nine years, imposed in 1948 following his plea of guilty to a charge of first degree murder in Davidson County, Tennessee. He contends that said confinement is illegal, and he bases his contention upon several grounds.

(1) Petitioner asserts that, following his arrest on January 23, 1948, he was forced to sign a statement admitting his guilt "by being whipped" by the police in the absence of counsel. (2) He asserts that he was afforded no counsel at his preliminary hearing. (3) He asserts that on March 12, 1948—the date upon which his sentence was imposed, but several days before his trial was scheduled—he was taken from the county jail in which he was then confined to the office of the prosecuting attorney, where, in the absence of his retained counsel, he was

[fol. 2] "induced" to enter a plea of guilty by being threatened with the elctric chair. And (4) he asserts that he was indicted by a grand jury from which members of petitioner's race (Negro) were systematically excluded.

With regard to the first three of the above-stated grounds, petitioner does not assert, nor does his petition otherwise indicate, that he has at any time raised them in state court proceedings and pursued them to exhaustion therein. Since, in the absence of circumstances not present in the case at bar, an affirmative showing of such exhaustion of state remedies is required by 28 U.S.C. §2254 before federal habeas corpus relief will lie, this court cannot consider the first three of petitioner's grounds for relief until such a showing is made, either by amendment or in a new petition. Petitioner's fourth ground, however—that of systematic exclusion of Negroes from the grand jury which indicted him—presents a different situation.

It appears that petitioner first raised this ground in the courts of Tennessee by means of a petition for habeas corpus.[1] The trial court denied the petition without a hearing, and petitioner appealed. Ultimately, the Supreme Court of Tennessee, in an unpublished opinion filed November 3, 1967, in the case of Willie Lee Henderson v. C. Murray Henderson, remanded the case and ordered that an evidentiary hearing be held. A hearing was held, and, as stated by Judge Oliver, "[u]pon the evidence introduced at that hearing there can be no doubt whatever

[1] This statement, as well as the following brief summary of the state proceedings in which petitioner has been involved, is based upon Judge Oliver's dissenting opinion in the case of Henderson v. Russell, filed July 6, 1970, by the Tennessee Court of Criminal Appeals.

[fol. 3] that Negroes were deliberately and systematically excluded from the Grand Jury which returned the indictment against this petitioner." Nevertheless, in the face of such evidence, the trial court again dismissed the petition. On appeal, the Tennessee Court of Criminal Appeals, in an opinion by Judge Walker, affirmed the decision of the trial court on the ground that petitioner had waived his right to challenge the composition of the grand jury which indicted him. State of Tennessee, ex rel. Willie Lee Henderson v. Lake F. Russell (July 6, 1970). The court was divided, however, with Judge Oliver dissenting (as indicated above) and Judge Galbreath concurring. Though Judge Galbreath stated that he concurred "completely with Judge Walker's opinion," because "[t]he law that failure to make an objection to the racial composition of a Grand Jury is waived unless raised by an appropriate pretrial motion is too well settled for this Court to disturb," he went on to state that "I recognize the irrationality of the law as it applies to ancient cases of this type. No lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948, just as scarcely anyone objected to the complete segregation of all public and private facilities of any kind in the State until the next decade." He concluded that " ... the law is as set forth in Judge Walker's opinion; and it must be changed, if ever it is (and I personally believe it will be soon or late), by an authority higher than this Court."

Petitioner next sought a writ of certiorari from the Supreme Court of Tennessee. The Supreme Court denied the petition on September 8, 1970, and, in effect, affirmed the decision of the Tennessee Court of Criminal Appeals.

[fol. 4] It is thus clear that petitioner has, indeed, complied with the exhaustion requirement of 28 U.S.C. §2254.

This court is of the opinion that the allegations of the instant petition raise constitutional issues of importance. However, more information is of course required before this court can grant or withhold relief. Accordingly, it is hereby ORDERED that respondent, within twenty (20) days from the entry hereof, show cause why the writ should not issue. It is suggested that a copy of the opinion of the Supreme Court of Tennessee rendered in the case of Willie Lee Henderson v. C. Murray Henderson (filed November 3, 1967) and a copy of the transcript of the evidentiary hearing which was held as a result of that opinion be submitted to this court along with the response.

/s/ Frank Gray, Jr.
UNITED STATES DISTRICT JUDGE

[fol. 1]

IN THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF TENNESSEE NASHVILLE, TENNESSEE

Willie Lee Henderson,
Petitioner

v.

Lewis Tollett, Warden
Tennessee State Penitentiary
Petros, Tennessee,
Respondent

Civil No. 5996

PETITION FOR A WRIT OF HABEAS CORPUS

(Filed December 29, 1970)

The Petitioner petitions this Court for the issuance of a Writ of Habeas Corpus pursuant to Title 20, U.S.C., section 2241:

MAY IT PLEASE THE COURT:

Comes now the Petitioner, Willie Lee Henderson is filing the Petition for a Writ of Habeas Corpus, seeking his release from the Tennessee State Penitentiary, where he is confined under a sentence of 99 years on a conviction of the crime of First Degree Murder, he alleged that his conviction and sentence are void because he was deprived of his right by the City Police Department. Without anyone to advise him of his right to remain silent. It is in violation of both the Tennessee and United States Constitution, that stands in direct conflict with Article XIV, section 2, and Article VI of the United States Constitution Amendment, placing the Petitioner in involuntary servitude.

The Petitioner is ignorant of law, and denied access to legal Books of Law, and is destitute, so he therefore begs the Court tolerance to his ignorance, and conditions, and prays it will not bar him the equal and just consideration of this Court. He presents herein in the only and best manner he knows, the issues that traverse democratic principles, and he prays Judgment of these issues, and that the insufficient culmination of a layman's knowledge of law, or form, will not stay that Judgment.

Petitioner has exhausted state remidies by first going through the Lower State Courts, appealing to the Court of Appeals and last filed a Petition for a Writ of Certiorari to the Tennessee State Supreme Court, which was denied September 8, 1970. EXHIBITS ON BACK OF THIS PETITION.

STATEMENT OF THE CASE

The Petitioner avers that on or about January 23, 1948, he was under arrest by City Detectives in the commission of a robbery and he was forced to signed statement, that he admitted the crime by being whipped by detectives and members of the City Police Department without having any Counsel to advise him of his right to ermain silent at the Police Department. How on the 26 day of January 1948, Petitioner was bound over to the Davidson County Criminal Court on a charge of assualt and battery with the intent to rob the said William H. Cotter, who was shot during the robbery and was not taken to a hospital until about 3;45 A.M. that Friday morning after being shot at a south Nashville whiskey store at 6:30 P.M. on the Thursday night of January 22, 1948, and he died 21 days after being shot. The death certificate clearly states that the cause of death was pneumonia.

The Petitioner further avers that he did not have any counselor at his preliminary hearing.

The Petitioner avers that on or about February 12, 1948 he was indicted along with John Thomas Shaw and Robert James Dobson by the Davidson County Grand Jury for murder in the first degree.

[fol. 2] The Petitioner further avers that he was indicted by a Grand Jury that did not have any Negroes on it. Also on March 12, 1948 Petitioner was forced to go on trial, Division One of Davidson County Criminal Court and placed before a Jury. Said Judge Chester K. Hart, presiding, and was sentenced to said confinement in the Tennessee State Penitentiary without any negro serviceing on the jury at the time of his trial. This were done without any Counsel being present to the case the introduction of evidence to establish the violation of Petitioner's right of counsel and not having negros on the jury, will explain facts is not in the record of his criminal court case no. 16323, it thus supplements, but does not contradict said record, and the introduction and consideration of such evidence is, therefore proper.

The record in Petitioner's murder case no. 16323, consists of the Presentment returned February 12, 1948, and the Minutes of Davidson County Criminal Court, Division One, for March 12, 1948, there is no reference in the record to indicate whether or not Petitioner was represented by counsel at any stage of the criminal proceedings, nor is there any affirmation showing of a waiver by Petitioner of his right to counsel.

ALLEGEMENT

Petitioner were suppose to be tried separate from the said two co-defendants, because he had not pleaded guilt

to said charge of murder in the first degree, as the said two co-defendants had. Therefore, his trial date was set for March 16, 1948, but on March 12, 1948, the trial date for the other two co-defendants, the Petitioner was taken from the county jail with said defendants to the prosecuting attorney's office by induced him to change his plea from not guilty to guilty by threatening to have him sent to the Electric Chair if he did not do so, and that this was in the absence of any attorney, representing Petitioner.

Since the Petitioner was threatened and induced in to pleading guilty in the absence of his paid attorney Tom Ed. Murry he believes the Court should have, or allowed him to contacted with a counsel before putting the Petitioner on trial before his scheduled trial date, by the court doing neither of the afore said this deprived the Petitioner of his constitutional right.

The legal principle is well settled that, the right to be represented by counsel is a fundamental right, going to the very basis of the administration of the criminal law, and places on the trial Judge the onus to inform the defendant of his rights amounts to a denial of the right. ---- The failure of the court to so inform him or to appoint a counsel for him, was fundamental error, stated in the Tennessee State Supreme Court acknowledge this rule to be the law in the case of Lynch vs. State, Ex rel.; Killebrew, 179 Tennessee 339, 166 S.W. 2d 397 (1941) in 39 C.T.S. Habeas Corpus, section 18; it clearly states, that the remedy of habeas corpus will lie to attack a conviction based on an unconstitutional or invalid statute. Stated in Com. vs. Smith, 11 A. 2d 656, 139 Pa. Super 357 (1940); Com. vs. Richards, 111 Pa. Super 124, quoted by Keller, Jg.. On or about March 26, 1964, the New

York U.S. Court of Appeals, issued a 6-2 ruling that widened the application of last years U. S. Supreme Court ruling requiring that a lawyer be provided for indigent persons charged with serious crime, even if they plead guilty.

In the case of Marbury vs. Madison, 1 Cranch 137, (1803) in the Supreme Court of the United States, Chief Justice Marshall wrote the opinion of the court saying, in part, -- "A law repugnant to the constitution is void ...., it is emphatically, to say what the law is ..." Composed solely of white persons with the design being to further deprive the Petitioner of the equal protection and due process of the law; the Petitioner offers the following: Congress has expressly forbidden the exclusion of a citizen from service as a Grand or Petit Juror in any state court, on grounds of race or color."

In the case of Patton vs. Mississippi, 332 U.S. 463, 6A Sup. Ct. 92, L. Ed. 72 (1947), Mr. Justice Black, writting for a unaminous court, wrote in part;"

Davidson County Criminal court held that wxclusion of negros from Grand and Petit Juries solely because of race denied negro defendants in criminal cases the equal protection of the laws, required by the Fourteenth (14) Amendment--- A long and unbroken line of our decisions since then has reiterated that principles, regardless of whether the discrimination was embodied in statute, or was apparant from the administrative practice of state jury selection officials; and regardless or whether the

[fol. 3] system for depriving defendants of their right was ingenuous or ingenidus: Griffin Et Al, vs. Illinois, 351 U.S. 95: "The United States Supreme Court in the case of Powell vs. Alabama, 287 U.S. 45 (1932) and

Norris vs. Alabama, 294 U.S. 587 (1935), upset the convictions on the grounds that the county in which they were tried had failed to summon qualified Negros for grand jury service." For example, in the so-called Scottsboro case in which negros had been indicted and convicted in the Alabama Courts for astatutory offense; the United States Supreme Court upset a conviction on the grounds that the lower courts had inadequate provision for counsel for the accused and invalidated and indictment had been returned had failed for more than a generation to summon qualified negros for grand jury service."

The United States Supreme Court meanwhile, has again remanded the case of Edgar Labat vs. Louisiana to the Federal District Court for Eastern Louisiana. The constitutional issue currently involved is systematic exclusion of negros from Grand or Petit Juries."

Under the law Jury Commissioner are under the duty not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of Jurors on racial grounds: Lassell vs. Texas, 339 U.S. ____, Hill vs. Texas, 316 U.S. 400, 404."

By the above dictums of the Unitde States Supreme Court, the Grand Jury which returned the indictments against the Petitioner was illegally constituted thus rendering the indictments and the convictions unconstitutional null and void. Even if it be deemed that the only way the Petitioner could make an attack on the systematic exclusion of negros from serving as grand jurors would be to do so in a direct appeal which the Petitioner do not concede. The cases are legion which holds that he can make an attack on the systematic exclusion of negros from serving as grand jurors, in a habeas corpus proceedings. see Carruthers vs. Reed, (C.C.A.B., Cir.) 102 F.2d 933..

"--Exclusion of negros from serving as grand jurors in criminal prosecutions, constitutes a denial of the equal protection of the law and are grounds for relief by habeas corpus proceedings". The Petitioner is also a meritorious challenge to Davidson County Criminal Court of Tennessee's jury selection system, a system that not only systematically excludes negros from its services, but also a system that is in open defiance to the laws of the State of Tennessee Governing Jury selections; and further in open violation to the Fourteenth (14) Amendment to the United States Constitution of the America:"

Grand Jury are to be selected in the following manner, under Tennessee Law: "10021 5B 27 (4015) formed by lots." To form.

The six amendment provides in part that in all criminal prosecations, the accused shall enjoy the right ---- to be confronted with the witnesses against him --- and to have assistance of counsel for his defence." Gideon vs. Wainwright, 372 U.S. 325 in violation of Texas penal code art. 1408 at this hearing, 375, S.W.2d 293, we granted certiorari to consider the important constitutional question the involves, 379 U.S. 815, White vs.. Maryland, 373 U.S. 59; Hamilton vs. Alabama, 368 U.S. 52; 372, U.S. at 342; Malloy vs. Hogan, 378 U.S. 1, 378 U.S. at 6; Murphy vs. Waterfront Comm'n, 378 U.S. 52. see E.G. 5 Wigmore; evidence (1367) 3d Ed. (1940); Kirby vs. United States, 174 U.S. 47, 55, 56.; Alford vs. U.S., 282 U.S. 687, 692; Greene vs. McElroy, 360 U.S. 474, 360 U.S. at 496-497; In Re Oliver, 333 U.S. 257 by counsel 333 U.S. at 273; Turner vs. Louisiana, 379 U.S. 446, 472-473; Willner vs. Committee, 373 U.S. 96, 103-104; West vs. Louisiana, 194 U.S. 258, 264; Stein vs. New York, 346 U.S. 156, 195-196; Dowdell vs. United States,

221 U.S. 325, 330; Motes vs. United States, 178 U.S. 458, 474; Mattox vs. United States, 156 U.S. 237, 242 243; Cf. Hopt vs. Utah, 110 U.S. 574, 581; Queen vs. Hepburn, 7 Cranch 290, 295; Cohens vs. Virginia, 6 Wheat, 264, 387 (1821); Chambers vs. Florida, 309 U.S. 227, 235, 238, (1940); Lumber co. vs. United States, 251 U.S. 385, 392 (1920).

Upon the foregoing statements and facts, the Petitioner is duly entitled to the redress sought in this petition, because the Petitioner's Constitutional Rights, as a citizen of the state of Tennessee, and also as a citizen of the United States of America, has been violated and as such that he is now being held in the Tennessee State Penitentiary, under a sentence of 99 years that is unconstitutional null and void.

[fol. 4] Wherefore the Petitioner, Willie Lee Henderson, respectfully moves the court to issue a writ of habeas corpus to the Respondent, Mr. Lewis Tollett, Warden of the Tennessee State Penitentiary at Petros, Tennessee, commanding him to appear with the body of the Petitioner, on a date certained to be named and to show cause why the Petitioner should not be released from this unconstitutional and illegal confinement.

Respectfully Submitted

/s/ Willie Lee Henderson
Petitioner

[Affidavit of Mr. Henderson and Motion for Leave to Proceed in Forma Pauperis Omitted in Printing]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

[Title Omitted in Printing]

NOTICE OF FILING DOCUMENTS

(Filed January 18, 1971)

Please take notice that certified copies of the following documents have this day been filed with the U. S. District Court Clerk at Nashville for use as evidence in connection with the above styled case. These documents are the records in the case of State of Tennessee, ex rel, Willie Lee Henderson vs. Lake Russell, Warden, Criminal Court of Davidson County, Case No. 4662 in that court.

1. Technical record in Criminal Court of Davidson County.
2. Bill of Exceptions, Criminal Court of Davidson County.
3. Exhibits to the Bill of Exceptions.
4. Brief on behalf of petitioner in the Court of Criminal Appeals.
5. Reply brief for the State of Tennessee in the Court of Criminal Appeals.
6. Petition for Writ of Certiorari to the Tennessee Supreme Court.
7. Reply of State to the petition for Writ of Certiorari.

[fol. 2]

Respectfully submitted,

/s/ R. Jackson Rose
R. JACKSON ROSE

Assistant Attorney General
Supreme Court Building
Nashville, Tennessee 37219
741-2865

[Certificate of Service Omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

[Title Omitted in Printing]

MOTION TO DISMISS

(Filed January 18, 1971)

Comes the respondent, Lewis S. Tollett, by and through the Attorney General, and moves the Court as follows:

1. To dismiss the action because the petitioner has heretofore applied for a writ of habeas corpus in Federal Court.

/s/ R. Jackson Rose
R. JACKSON ROSE
Assistant Attorney General
Supreme Court Building
Nashville, Tennessee 37219

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

WILLIE LEE HENDERSON

VS.

LEWIS S. TOLLETT, Warden,
Brushy Mountain State Prison

Civil No. 5996

ORDER

[Received for Entry 3:45 P.M., February 3, 1971]

This proceeding involves a petition for the writ of habeas corpus. Of the four grounds originally asserted for such relief, only one is herein at issue—i.e., whether the indictment pursuant to which petitioner was convicted and sentenced was, in fact, void for the reason that the indicting grand jury was one from which members of petitioner's race had been systematically excluded. In an order of this court filed December 29, 1970, it was noted that this matter raises Constitutional issues of considerable importance, but that "... more information is of course required before this court can grant or withhold relief." Accordingly, it was ordered that respondent show cause why the writ should not issue. It was suggested that a copy of the opinion rendered by the Supreme Court of Tennessee in the case of Willie Lee Henderson v. C. Murray Henderson (filed November 3, 1967) and a copy of the transcript of the evidentiary hearing which was held as a result of that opinion be submitted to this court along with the ordered response. Such response has now been forthcoming, and it was accompanied by

[fol. 2] certain documents comprising the record of petitioner's habeas corpus proceeding in State court, which was initiated following the November 3, 1967, opinion, *supra*, and which was based upon the same contention as the instant petition. The Tennessee Supreme Court opinion of November 3, 1967, *supra*, was not, however, included. Nevertheless, this court is of the opinion that sufficient information has been furnished, and it is of the opinion that the writ must issue.

It appears from the record in its present state that petitioner first raised the racial exclusion issue in a State habeas corpus proceeding, Henderson v. Henderson, supra, wherein his petition was denied at the trial level without a hearing. Ultimately, however, the Tennessee Supreme Court reversed this denial and ordered that an evidentiary hearing be held. Apparently, petitioner was provided with court-appointed counsel who, in effect, elected to start the proceeding *de novo* by filing a second petition on January 12, 1968, in the Criminal Court of Davidson County, Tennessee (No. 4662). A hearing was held on the new petition, and a copy of the transcript of this hearing, as noted *supra*, has now been made a part of the record in the instant case. The evidence adduced at this hearing established without contradiction (a) that no Negro served on a Davidson County grand jury until some years after petitioner was indicted, despite the fact that roughly one quarter of the population of that county, at the time of petitioner's indictment, were members of that race and (b) that the names of black persons on the lists from which members of each grand jury were chosen at that time marked with the designations "c" or "col." for "colored." The trial judge held as a mat-

[fol. 3] ter of fact that no showing of systematic exclusion of blacks from the indicting grand jury

had been made. On appeal, a divided Court of Criminal Appeals, with apparent reluctance, affirmed the decision of the trial judge on the ground, simply stated, that regardless of whether or not a showing of systematic exclusion had been made at the hearing, petitioner had long since waived his right to complain thereof, (a) because he had failed to raise the issue by the procedures available to him at the time of his indictment and conviction, and (b) because his guilty plea had abrogated any defects in the indictment. Henderson v. Russell, No. 5996 (Tenn. Ct. Crim. App., filed July 6, 1970). This decision of the Tennessee Court of Criminal Appeals became the final ruling in the case, upon the Tennessee Supreme Court's denial of certiorari.

Before determining whether the writ should issue, the court must consider respondent's motion to dismiss this action on the ground that " ... petitioner has heretofore applied for a writ of habeas corpus in Federal Court." There being nothing in the record to show that the question now presented has been either raised or adjudicated in any prior proceedings in this court, and there being nothing to indicate that petitioner has, in earlier proceedings, deliberately withheld the newly-asserted ground or otherwise abused the writ as provided for in 28 U.S.C. §2244(b), the motion to dismiss is DENIED.

From a consideration of the whole record, it appears to the court that the writ must issue. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966), certiorari denied 386 U.S. 991 (1967).

Accordingly, the writ will issue, returnable before me March 2, 1971, at 2:00 p.m. It is so ORDERED.

/s/ Frank Gray, Jr.
UNITED STATES DISTRICT JUDGE

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

WILLIE LEE HENDERSON
Petitioner-Appellee

v.

LEWIS S. TOLLETT, WARDEN BRUSHY MOUNTAIN STATE FARM,
Respondent-Appellant

Civil No. 5996

ORDER

(Received for Entry 10:50 A.M., April 12, 1971)

This proceeding involves a petition for the writ of habeas corpus. Petitioner is presently confined, in the custody of respondent, at the Brushy Mountain Prison, Petros, Tennessee, where he is serving a sentence of ninety-nine years which was imposed by the Criminal Court of Davidson County, Tennessee, following his plea of guilty, in 1948, to a charge of murder in the first degree. In his *pro se* petition, petitioner sets forth four grounds upon which he bases his claim that his present incarceration is illegal. With regard to the first three of his asserted grounds, petitioner makes no affirmative showing, nor does he otherwise indicate, that he has ever presented them for adjudication to the courts of Tennessee. Since a showing of exhaustion of available state remedies is required by 28 U.S.C. §2254 before federal habeas corpus relief can issue, this court, by order entered December 29, 1970, refused to take cognizance of peti-

tioner's first three grounds for relief. As his fourth ground for relief, petitioner asserts that his
[fol. 2] present confinement is illegal, because he was indicted by a grand jury from which members of his race (Negro) had been systematically excluded.

With regard to this fourth ground, the petition contains the required showing of exhaustion of available state remedies. Additionally, as was noted by this court in its order of December 29, 1970, this ground raises constitutional issues of considerable magnitude. Accordingly, the aforesaid order directed respondent to show cause why the writ should not issue. The directed response was subsequently forthcoming, and, no satisfactory cause to the contrary appearing therein, it was ordered that the writ issue and that petitioner be brought before this court at an appointed time for a hearing. The hearing was held as ordered, and, as a result thereof, the following have been established as the basic facts of the case.

Petitioner, a black youth, was indicted by the Davidson County Grand Jury in 1948 on a charge of murder in the first degree. Although roughly one fourth of the population of Davidson County in 1948 was composed of members of petitioner's race, no black people served on the grand jury which indicted him; no black people had ever served on a Davidson County Grand Jury prior to the time of his indictment; and no black people served on the Davidson County Grand Jury until well into the next decade following his indictment. What is more, whenever the name of a black citizen appeared on the venire lists from which members of the Davidson County Grand Jury were chosen at the time of petitioner's indictment, it was marked with either the designation "c" or the designation "col" to signify that the bearer of the name was "colored." Peti-

[fol. 3] tioner was represented by counsel who failed to object to the composition of the indicting grand jury, quite simply, because the possibility never occurred to him. For the same reason, he never apprised petitioner of the possibility of attacking his indictment on that ground, and petitioner himself, a twenty-year-old with less than a sixth grade education, never thought of the possibility on his own. Ultimately, petitioner pleaded guilty (he now claims as the result of coercion and trickery, but that is irrelevant in the present context) and was sentenced to serve a term of ninety-nine years in prison.

After serving some two decades in prison, petitioner collaterally attacked his sentence in a state habeas corpus proceeding on the ground that he had been indicted by a racially-exclusive grand jury. His petition was denied at the trial level without a hearing. Eventually, however, the Supreme Court of Tennessee reversed this denial and ordered that an evidentiary hearing be held on petitioner's allegations. Apparently petitioner was provided with court-appointed counsel who, in effect, elected to begin the proceeding *de novo* by filing a second and somewhat more sophisticated petition, based upon the same ground, in the Criminal Court of Davidson County (No. 4662) on January 12, 1968. A hearing was held on the new petition, and at that hearing all of the facts recited above were adduced. Nevertheless, the trial judge found as a matter of fact that there had been no systematic exclusion of Negroes from the grand jury which had indicted petitioner, and, accordingly, the petition was denied.

Petitioner appealed, and a divided Court of Criminal Appeals of Tennessee, with apparent reluctance, affirmed the decision of the trial judge. The appellate court did

not, however, affirm the trial judge's finding of fact that there had been no systematic exclusion of Negroes from the Davidson County Grand Jury in 1948. Rather, it based its decision on the ground that, regardless of [fol. 4] whether petitioner was correct or not in contending that members of his race had been systematically excluded from the grand jury which had indicted him,[1] he had waived all right to complain of the grand jury's composition, (a) because he had failed to raise that issue by means of the procedural devices available to him at the time of his indictment and conviction, and (b) because his plea of guilty had abrogated any defects which the indictment might have contained. *Henderson v. Russell*, No. 5996 (Ct. Crim. App. Tenn., filed July 6, 1970). This decision by the Court of Criminal Appeals of Tennessee became the final state court ruling in the case upon denial of certiorari by the Supreme Court of Tennessee. Finally, having thus exhausted his available state remedies, petitioner sought federal habeas corpus relief. It remains, then, to consider whether such relief shall be granted.

(I) The constitutional issue: indictment of a black man by a grand jury from which members of his race have been systematically excluded.

The unconstitutionality of racially-exclusive grand juries, insofar as their actions affect members of the excluded race, has been firmly established since at least as early as 1880. *Strauder v. West Virginia*, 100 U.S. 303 (1880). Neither an in-depth analysis of the facts of the instant case nor a lengthy citation of authorities is

[1] The clear implication of the three opinions rendered in the case is that the members of the Court of Criminal Appeals of Tennessee felt that petitioner's contention was correct.

required to support the proposition that petitioner's showing of the total absence of members of his race [fol. 5] from the Davidson County Grand Jury in 1948 and prior years constitutes proof of a *prima facie* case of systematic exclusion of such persons, thereby casting the burden on respondent to prove to the contrary. *Whitus v. Georgia*, 385 U.S. 545 (1967). This burden respondent clearly has failed to sustain. Moreover, and rebuttal proof which respondent might have offered would have been essentially ineffective in the face of petitioner's showing that the names of black people were given distinguishing marks whenever they appeared in the venire lists from which Davidson County Grand Jurors were chosen at the time of his indictment, for it is obvious that such " ... marking of the jury ... [lists] with the letter "C" [or with the abbreviation "col"] to indicate persons of the Negro race constituted a purposeful discrimination which is unlawful under the Federal Constitution." *Bonds v. State*, 421 S.W.2d 87, 90 (S. Ct. Tenn. 1967). It is thus ineluctable that petitioner was indicted by an unconstitutionally-composed grand jury, and it is also ineluctable that such a body is legally not a grand jury at all.

(II) The waiver issue: effect of petitioner's failure to object, at the time of his indictment or shortly thereafter, to the racial composition of the grand jury which indicted him.

Respondent concedes—as it is apparent he must—that petitioner has proved everything necessary fully to support his contention that members of his race were systematically excluded from the grand jury which indicted him. He thus asserts " ... that the only [remaining] issue is whether or not the petitioner has waived his

rights to question the composition of the [indicting] grand jury ...," and he strenuously insists that petitioner has indeed waived such rights. This court does not agree.

[fol. 6]

With all deference to what respondent refers to as a "long line of cases" in Tennessee which appear to hold otherwise, this court feels it is illogical to contend that either petitioner's failure timely to object to the composition of the indicting grand jury or his subsequent entry of a guilty plea constitutes a waiver, by operation of law, of his right to object to the composition of that grand jury at the present time. Such a contention, as pointed out by Judge Oliver in his well-reasoned and convincing dissent in *Henderson v. Russell*, *supra*, rests upon a confusion between an indictment which is merely technically defective and one—such as petitioner's—which is a complete nullity.[2] In the latter case, stated in the simplest of terms, there is no "defect" in the indictment to waive, for there is in fact no "indictment" to contain such a defect: instead, there is merely a sheet of paper, meeting, to be sure, the facial requisites of a valid indictment, but having in actuality no legal effect whatsoever. It is clear that any criminal prosecution brought incident to such an "indictment" is illegal and that a plea of guilty to such an "indictment" is of no binding effect, for such an "indictment" confers no subject-matter jurisdiction on the sentencing court. *State v. Hughes*, 371 S.W.2d 445 (S. Ct. Tenn. 1963); *Robinson v. City of Memphis*, 277 S.W.2d 341 (S. Ct. Tenn. 1955); and cases cited in *Henderson v. Russell*, *supra*, (Oliver, J., dissenting).

---

[2] Thus, for example, in the case of Bonds v. State, supra, an indictment rendered by a racially-exclusive grand jury in Williamson County " ... dismissed as void" by the Supreme Court of Tennessee (and this despite the fact that, strictly speaking, defendant's challenge to the racial composition of the indicting grand jury was not timely raised.)

[fol. 7] Respondent places great store in the fact that a defendant in federal court may, under Rule 12(b)(2) of the Federal Rules of Criminal Procedure, waive the right to complain of the racial composition of the grand jury which indicted him if he fails to raise that issue at a specified stage in the proceeding. Indeed, the crux of his entire position with regard to waiver seems to be the proposition that if unconstitutionality of grand juries may be waived in federal court, then the same rule should apply to state court proceedings. His basic assumption is that, if petitioner had been indicted by a federal grand jury and sentenced by a federal judge, then he would now be precluded from objecting to the racial composition of the indicting grand jury. From this premise, respondent infers that the same result should be effected in the case at bar.

This court is not persuaded by respondent's argument and is of the opinion that it fails for at least three reasons: (1) his basic assumption is factually incorrect; (2) even if his basic assumption were true, a waiver under Rule 12 is not analogous, in terms of what is actually waived, to the waiver assertedly made by the instant petitioner; and (3) ignoring completely (1) and (2), *supra*, the case law is clear as to the test for waiver which this court must apply in the case at bar, and, applying that test, it is inescapable that petitioner has waived nothing. A brief amplification of the foregoing considerations is here in order.

(1) Rule 12(b)(2), Federal Rules of Criminal Procedure, provides that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment ..." must be raised before trial, otherwise they are waived. In his brief, respondent sets forth pertinent

[fol. 8] portions of the Notes of Advisory Committee on Rules to point out that "[i]llegal selection or organization of the grand jury" is one of the defenses or objections thus subject to waiver, and he cites several federal cases which refuse, on grounds of waiver under Rule 12, to permit the challenge of indictment by racially-exclusive grand juries to be raised.

Nevertheless, respondent's brief omits an important consideration, namely, the fact that Rule 12(b)(2) expressly provides that the defense of lack of jurisdiction is not waived by failure to raise it before trial. It is indeed difficult, if not impossible, to conceive how the rule could provide otherwise, for it is axiomatic in Anglo-American jurisprudence that one cannot waive lack of jurisdiction, even if one so wishes. And, as noted above, a void indictment, under the law of Tennessee, confers no subject-matter jurisdiction on the sentencing court. Hence, Rule 12, by its very language, would not necesitate a finding of waiver in the case at bar, even if it were applicable herein.

Further, Rule 12(b)(2) also provides that, in the case of those defenses and objections which are waived if not raised before trial, "... the court for cause shown may grant relief from the waiver." Respondent has not apprised this court of any reason why a court before which an individual's conviction is attacked collaterally may not likewise grant relief from such waiver, upon a showing of good cause. In the instant case, any number of factors have been established which suffice to constitute such a showing. Thus, if petitioner were held, by operation of law, at some point to have waived his right to challenge the racial composition of the grand jury which indicted him, it is readily apparent that this court could appro-

[fol. 9] priately grant relief from such waiver, even if Rule 12(b)(2) actually applied to the case at bar. It is clear from the foregoing considerations that respondent's basic premise is incorrect.

(2) Assuming, *arguendo*, that a waiver under Rule 12 were categorical and would admit of no exceptions, it would still avail respondent nothing to point to the situation in federal court and argue that the same considerations should apply in the case of the instant petitioner, for a waiver under Rule 12 is not analogous to the waiver assertedly made by this petitioner: what this petitioner has assertedly waived cannot be waived under Rule 12.

More specifically, this petitioner is attacking the racial composition of the grand jury which indicted him on the ground that that composition resulted from a selection process which denied him equal protection of the laws. Thus the part of the Constitution upon which the instant petition is based is the Equal Protection Clause of the Fourteenth Amendment, and the right which respondent contends petitioner is now precluded from asserting is the right to equal protection of the laws. The Equal Protection Clause is worded as follows: "[n]o *State* shall ... deny to any person within its jurisdiction the equal protection of the laws," (emphasis added) and it follows from this wording that, whatever may be the standard with which federal grand jury selection must comply, it is not the one set forth in the Equal Protection Clause of the Fourteenth Amendment[3] for that clause

[fol. 10] " ... effects a prohibition only on the states,"

[3] In actual effect, of course, the federal and the state standards are the same. Nevertheless, the rights which give rise to the respective standards are different: if a federal defendant complains of the racial composition of the grand jury which indicted him, he is in fact complaining that his

(Continued on following page)

Washington v. United States, 401 F.2d 915, 922 (D.C. Cir. 1968), and is thus inapplicable to the Federal Government, the Federal Judiciary, and the Federal Rules of Criminal Procedure. The sole point which this court wishes to stress in the present contenxt, however, is that, whatever it may be that a federal defendant waives under Rule 12(b)(2), it is clearly not the right to complain of a denial of equal protection of the laws by virtue of racially-exclusive grand jury selection. It follows that the waiver provision of Rule 12 is necessarily not analogous to the waiver which respondent asserts was made by this petitioner: the practice in federal court has no bearing whatever on the issue presently before this court, and the cases cited by respondent are inapposite in the present context.

(3) Finally, ignoring the foregoing considerations completely, it is readily apparent from the cases that respondent's argument with respect to waiver is not well taken. "The 'waiver' asserted in this case is simply a diaphanous euphemism for forfeiture of rights resulting from a procedural default," *Labat v. Bennett*, 365 F.2d 698, 707 (5th Cir. 1966), certiorari denied 386 U.S. 991 (1967), and the law is clear that "[a] procedural default, such as the one here in question, may not be regarded as a waiver unless it appears from the evidence that the default resulted from a

[fol. 11]

(Continued from preceding page)

Fifth Amendment rights have been violated, while when a state defendant makes the same charge, he is in fact complaining (as is this petitioner) of an abridgement of his Fourteenth Amendment rights. See e.g., Washington v. United States, infra. Thus, violation of the Equal Protection Clause of the Fourteenth Amendment is not a defense to a federal prosecution, at least insofar as is relevant here, and hence is not one of the matters that can be waived under Rule 12.

deliberate choice made by counsel and participated in by his client." *Wade v. Yeager*, 377 F.2d 841, 846 (3rd Cir. 1967), certiorari denied 393 U.S. 893 (1968). More specifically, as stated by the United States Supreme Court, "[t]he classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 146 ALR 357 ... furnishes the controlling standard .... [And] a state court's finding of waiver [does not] bar independent determination of the question by the federal courts on habeas [corpus], for waiver affecting federal rights is a federal question [citation omitted]." *Fay v. Noia*, 372 U.S. 391, 439 (1963). In short, regardless of whatever may be the procedural rule with respect to waiver in the criminal courts of Tennessee and regardless of whatever may be the federal practice in that regard, it is clear that the test for waiver which must be applied by this court in this case is the one expounded by the Supreme Court in the case of *Johnson v. Zerbst*, *supra*. It remains to examine that test in the light of the facts of the case at bar.

Under the holding in *Johnson v. Zerbst*, the " ... 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and ... 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver ... must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, conduct, and experience of the accused." *Johnson*, *supra*, at 464 (citations omitted).

[fol. 12] Viewing this petitioner in the light of his experience and background at the time of his in-

dictment and conviction, it is readily apparent that the presumption against waiver set forth in *Johnson v. Zerbst* works conclusively to preclude a finding of waiver in his case, for there is nothing in the record which rebuts such presumption in any manner. However, petitioner need not place his reliance upon the effect of the presumption alone, for the uncontroverted evidence adduced in this case obviates the need for such reliance: this evidence establishes as a matter of fact that petitioner was unaware of so much as the remotest possibility of attacking his indictment on the ground herein at issue at the time the indictment was returned, at the time of his guilty plea and sentence, or at any other time until shortly before he actually raised the matter in his state habeas corpus petition. Clearly, under the *Johnson v. Zerbst* standard, petitioner cannot be held to have waived something of which he was not even aware.

It might be contended that, since the possibility of attacking an indictment on the ground that it was rendered by a racially-exclusive grand jury has long been available, *Strauder, supra*, petitioner's counsel should be charged with knowledge of such possibility and that such knowledge should, in turn, be imputed to petitioner. Such an argument is clearly not well taken in light of the fact that "[n]o lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948 ...." *Henderson v. Russell, supra*, (Galbreath, Jr., concurring). What is more, petitioner's attorney stated in an affidavit executed in conjunction with petitioner's state court proceeding [fol. 13] that, indeed, the possibility of raising the equal protection objection never occurred to him and that, in consequence, he never mentioned such possibility to petitioner. Given this latter fact, even if petitioner's

counsel had been well aware of the possibility of attacking petitioner's indictment on equal protection grounds, but had, through either choice or negligence, failed to assert such grounds in his client's defense, his failure could not, on the facts of this case, be imputed to petitioner, because "[a] choice made by counsel not participated in by the petitioner does not automatically bar relief." *Fay v. Noia*, *supra*, 439.

In substance, shorn of the extraneous trappings of legal fiction, the outcome of this case turns upon the answer to the following simple question: Can a twenty-year-old black defendant, who had less than a sixth-grade education when he was charged with murder in 1948, be held intentionally to have relinquished or abandoned a known right or privilege by virtue of his failure, without contrary advice of counsel, to assert in his own defense the proposition that his indictment was constitutionally void in the light of the Equal Protection Clause of the Fourteenth Amendment, when, in fact, "[n]o lawyer in this State" would have thought of asserting such a defense? This court holds that he cannot. *Labat v. Bennett*, *supra*; *Ellzey v. Breazeale*, 277 F. Supp. 948 (S.D. Miss. 1967); *Gordon v. Breazeale*, 246 F. Supp. 2 (N.D. Miss. 1965).

It follows that petitioner's indictment and all proceedings based thereupon are void and of no legal effect. In consequence, his present incarceration is repugnant to the Constitution of the United States. It is, accordingly, ORDERED that he be released forthwith from the custody of the respondent.

/s/ Frank Gray, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

[Title Omitted in Printing]

NOTICE OF APPEAL

(Filed April 30, 1971)

Notice is hereby given that Lewis S. Tollett, Warden, Brushy Mountain State Prison, defendant above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the order granting the release of Willie Lee Henderson, petitioner, entered in this action on the 12th day of April, 1971.

/s/ R. Jackson Rose
R. JACKSON ROSE
Assistant Attorney General
Supreme Court Building
Nashville, Tennessee 37219
741-2865
Attorney for Respondent,
Lewis S. Tollett

[Certificate of Service Omitted in Printing]

NO. 71-1451

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

WILLIE LEE HENDERSON,
Petitioner-Appellee,

v.

LEWIS S. TOLLETT, Warden,
Respondent-Appellant.

APPEAL from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided and Filed April 20, 1972.

Before: PHILLIPS, Chief Judge, and CELEBREZZE and MILLER, Circuit Judges.

[Opinion of Sixth Circuit Omitted because printed in Petition for Certiorari at pages 1a-12a]

SUPREME COURT OF THE UNITED STATES

October 16, 1972

TOLLETT v. HENDERSON
No. 72-95

"The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted."

PROCEEDINGS IN STATE COURTS IN EARLIER HABEAS CORPUS CASE

The proceeding in an earlier Tennessee State court habeas corpus proceeding are attached to the "Notice of Filing Documents" filed in the U. S. District Court in this case January 18, 1971 (A. 16).

The pleadings filed from the case of *State of Tennessee, ex rel. Willie Lee Henderson v. Lake Russell, Warden*, No. 4662, in the Criminal Court of Davidson County* are reprinted as follows:

---

* The exhibits, certified according to the Acts of Congress, have been sent by the Sixth Circuit Clerk to the Clerk of this Court.

* The only State Court proceedings not printed are the briefs in the Tennessee Court of Criminal Appeals, the petition for certiorari to the Tennessee Supreme Court and the brief in opposition to that petition.

[TECHNICAL RECORD]

In The
COURT OF CRIMINAL APPEALS,
STATE OF TENNESSEE
At Nashville, Tenn.

APPEALED FROM
Davidson County Criminal Court Division Two
The Honorable John L. Draper, Judge, presiding

(DEFENDANT IN PENITENTIARY)

Certified Transcript Of Cause

STATE OF TENNESSEE, EX REL
WILLIE LEE HENDERSON

vs.

LAKE RUSSELL, WARDEN
TENNESSEE STATE PENITENTIARY

JUDGEMENT LOWER COURT

PETITION FOR WRIT OF HABEAS CORPUS

ATTORNEYS

Mr. Robert S. Brandt, Assistant Attorney General
6th Floor, Metropolitan Courthouse
For State

Appointed: Robert F. Hedgepath, Nashville

IN THE COURT OF CRIMINAL APPEALS, NASHVILLE, TENNESSEE

STATE OF TENNESSEE, ex rel., WILLIE LEE HENDERSON VS. LAKE RUSSELL, WARDEN, ETC.	Davidson County (No. 4662 Below)

ORDER APPOINTING COUNSEL

In this cause it appearing to the Court that appointed counsel in the trial court was relieved for good cause shown, and that the plaintiff in error is not represented by counsel on appeal, and that he is a poor person without means for employing counsel.

It is, therefore, Ordered that the Honorable Robert F. Hedgepath be, and he is hereby, appointed as counsel for the said Willie Lee Henderson to take whatever action he deems necessary and proper in the best interests of the said Willie Lee Henderson on the appeal. 3/19/69.

Technical Record, State Criminal Court

STATE OF TENNESSEE, EX REL
WILLIE LEE HENDERSON

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY

PETITION FOR HABEAS CORPUS

Received of Earl Hawkins, Criminal Court Clerk, the following exhibits in connection with the above styled cause:

Exhibit #1 to petitioner's case - Copy of minute entry.

Exhibit #2 to Petitioner's case - Affidavit of Tom Ed Murray.

Exhibit #3 to Petitioner's case - U. S. Department of Commerce Bureau of the Census - Washington.

Exhibit #4 to Petitioner's case - Minutes

Exhibit #5 - Certificate

This the ___ day of March, 1969.

_____

Technical Record, State Criminal Court

I N D E X

Amended Answer	13
Amended answer filed	12
Answer	7 - 8
Answer filed	6
Attorney relieved	30
Bill of Cost	31
Bill of Exceptions filed	28
Caption - January Term, 1968, Div. II	1
" May Term, 1968, Div. II	14
" September Term, 1968, Div. II	16
" January Term, 1969, Div. II	25
Certificate and seal	32
Demurrer	9
Motion to dispose of demurrer of respondent's answer, etc.	10
Motion for new trial	23
Motion for new trial overruled	24
Motion to place into evidence certified copies of records	21
Motion to be relieved as counsel	29
Opinion - Petition for writ of habeas corpus dismissed	18 - 20

Technical Record, State Criminal Court

Order allowing state to amend answer 11

Order denying prayer for dismissal of petition 15

Order granting petitioner's motion to place into evidence certified copies of records 22

Pauper's Oath 27

Pauper's Oath filed 26

Petition for writ of habeas corpus 3 - 5

Petition for writ of habeas corpus filed 2

Petition for writ of habeas corpus under advisement 17

BILL OF EXCEPTIONS AND EXHIBITS FILED UNDER SEPARATE COVER.

[1]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIVISION TWO MINUTES, JANUARY TERM, 8TH DAY OF JANUARY, 1968
MINUTE BOOK 64, PAGE 774

CAPTION
JANUARY
TERM
1968
DIV.
TWO

MONDAY, JANUARY 8, 1968

Pleas at the Courthouse in the City of Nashville, County of Davidson, State of Tennessee it being the January Term, the second Monday of January, 1968, and the eighth day of January thereof, and one hundred ninety second year of the American independence, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee, when the following proceedings were had, towit:

Division Two of the Criminal Court of Davidson County, Tennessee, was duly opened by James Jones and Charles R. Hill, officers of this Court, and prayer was offered by Reverend Larry Sharp, Pastor of the Southern Methodist Church at Goodlettsville.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM, 12TH DAY OF JANUARY, 1968
MINUTE BOOK 65, PAGE 18

FRIDAY, JANUARY 12, 1968

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662	STATE OF TENNESSEE, EX REL.
PETITION	WILLIE LEE HENDERSON,
FOR	PETITIONER
WRIT	
OF	VS.
HABEAS	C. MURRAY HENDERSON, WARDEN,
CORPUS	TENNESSEE STATE PENITENTIARY,
FILED	RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

A petition for a writ of habeas corpus was received by the Court in this cause and marked filed this date.

Mr. William S. Westerman, Attorney for Petitioner.

(A copy of the Petition follows)

Ordered that Court stand adjourned until Monday morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

IN THE CRIMINAL COURT OF DAVIDSON COUNTY TENNESSEE, DIVISION TWO

STATE OF TENNESSEE ex rel.,
WILLIE LEE HENDERSON

PETITIONER

VS.

C. MURRAY HENDERSON, WARDEN,
TENNESSEE STATE PENITENTIARY

RESPONDENT

No. 4662

PETITION FOR A WRIT OF HABEAS CORPUS

(Filed January 12, 1968)

Petitioner would show to the Court that he is a citizen of the State of Tennessee and is illegally restrained of his liberty, as hereinafter set out, by Respondent at the Tennessee State Penitentiary at Nashville in compliance with an order of the Davidson County Criminal Court, Division I, which convicted petitioner of first degree murder and sentenced him to confinement for ninety-nine years. Said order dated March 12, 1948, is of record in the Davidson County Criminal Court Clerk's Office and is not annexed hereto because same is not in issue.

Heretofore, petitioner has filed two petitions for writs of habeas corpus, one of the 8th day of June, 1964, which was dismissed, and one on September 3, 1964 which was denied after a full evidentiary hearing on the meritorious allegations, which denial was affirmed by the Supreme Court on September 9, 1966. Since those proceedings did not raise the issue of systematic exclusion of members of petitioner's race from the grand or petit juries, and no

issue relevant to said petitions or proceedings is raised herein, copies of said petitions and proceedings are not annexed hereto.

[4]

Petitioner would show to the court that on and for many years prior to the date he was indicted by the Davidson County Grand Jury, February 12, 1948, none or very few members of petitioner's race, Negro, served on said Grand Jury; and that on and for many years prior to the date he was sentenced by a Davidson County petit jury, March 12, 1948, none or very few members of petitioner's race served on said petit juries. Petitioner alleges further that at and for an extended period of time prior to the time petitioner was indicted and sentenced, members of his race were systematically excluded from the grand and petit juries of Davidson County, Tennessee; and that said juries were improperly and unlawfully constituted as to petitioner in violation of the rights guaranteed petitioner by the Tennessee and United States Constitutions.

Petitioner would further show the Court that at the time of said indictment and trial he was not informed and had no knowledge of his right to properly constituted grand and petit juries, nor was he questioned or advised about said rights or about attacking said indictment or sentence on the grounds of deprivation of said rights. Petitioner would further allege on information and belief that the lawyer who represented him at the trial which resulted in the said conviction and sentence had no knowledge of systematic exclusion of members of the Negro race from the grand and petit juries connected with said trial and that his lawyer did not advise him with reference to said rights, nor did his lawyer attack said indictment or sentence on grounds of deprivation of said rights. Petitioner would further

show that he never expressly waived his right to challenge the constitution of said grand or petit juries and that none of his actions or failures to act constituted an

[5]

intelligent waiver of said constitutional right that members of his race not be systematically excluded from said grand or petit juries.

Premises considered petitioner prays:

1. That this matter be set for early hearing.

2. That the indictment on which the conviction and sentence are based and the sentence petitioner is presently serving be declared void and of no effect.

3. That a writ of habeas corpus issue to the defendant ordering that the body of petitioner be delivered to the Court.

4. That all necessary and proper proceedings be had hereunder.

5. That petitioner have such other, further and general relief as the nature of the case may require.

/s/ William S. Westerman
Court Appointed Attorney for Petitioner

STATE OF TENNESSEE)

COUNTY OF DAVIDSON)

Willie Lee Henderson, who being duly sworn makes oath that the statements and allegations in the foregoing petition are true, and that those matters alleged on information and belief, he verily believes to be true.

/s/ Willie Lee Henderson

Sworn to and subscribed before me this 5 day of January, 1968.

/s/ Jimmy W. Rose
Notary Public

My Commission expires: 24 Jan. 1970

---

[6]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIVISION II
MINUTES, JANUARY TERM, 16TH DAY OF JANUARY, 1968
MINUTE BOOK 65, PAGE 24

TUESDAY, JANUARY 16, 1968

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662
ANSWER
FILED

STATE OF TENNESSEE, EX REL.
WILLIE LEE HENDERSON,
PETITIONER

VS.

C. MURRAY HENDERSON, WARDEN,
TENNESSEE STATE PENITENTIARY,
RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

An answer to the petition for writ of habeas corpus filed in this cause was received by the Court and marked filed this date.

Mr. Robert S. Brandt, Assistant Attorney General for the State.

(Copy of Answer follows)

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

---

[7]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY TENNESSEE, DIVISION TWO

STATE OF TENNESSEE, ex rel
WILLIE LEE HENDERSON

Petitioner

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY
NASHVILLE, TENNESSEE

Respondent

NO. 4662

ANSWER

(Filed January 16, 1968)

Respondent, C. Murray Henderson, for answer to the writ of habeas corpus filed against him in this cause says:

That he admits he is in official custody of the petitioner but denies that said custody is illegal or unlawful.

I.

Respondent would show to the Court that the allegations of the petitioner that none or very few members of petitioners race served on the grand and petit jury which indicted and tried him are insufficient as a matter of law. Petitioner cites no statistics or other pertinent data which would show to the Court that members of his race were systematically excluded from the grand and petit jury. A mere naked allegation of systematic exclusion is insufficient to raise a question: See *Whitus v. Georgia*, 385 U.S. 545 (1967), *Swain v. Alabama*, 380 U.S. 202 (1965), *Brown v. Allen*, 344 U.S. 443 (1952), and *Patton v. Mississippi*, 332 U.S. 463 (1947). All of these cases hold that there must be a statistical showing of imbalance of certain proportion before a prima facie case of systematic exclusion will be made. Also important is this Court's decision in the case of State of Tennessee v. James Walden and Norris Givens in which this Court

[8]

held that Negroes were not systematically excluded from grand juries in Davidson County, Tennessee.

II.

The Respondent would show to this honorable Court that the petitioner failed to raise the question of systematic exclusion of Negroes from the grand jury which indicted him at the proper time. That question must be raised prior to the entering of a plea to an indictment. Petitioner's attorney at his trial and conviction was on notice that it was illegal to systematically exclude Negroes from the grand juries. The case of *Strauder v. West Virginia*, 100 U.S. 303 (1879) was decided in 1879 and has been the

law since that date. It was held in that case that Negroes could not be excluded by law from serving on a grand jury. There appears to be no explanation advanced for the failure of the defendant to raise the question at the proper time.

III.

Respondent urges this Court that the defendant is seeking to make a collateral attack on a valid conviction and judgment of the Criminal Court of Davidson County, Tennessee. It is a well settled proposition of law that a habeas corpus cannot be used to make a collateral attack upon a valid Court judgment.

Now, having fully answered, the Respondent prays that the petition for writ of habeas corpus filed against him in this cause be dismissed and that the petitioner be returned to him for further custody.

Respectfully submitted,

/s/ Robert S. Brandt
Robert S. Brandt
Assistant District Attorney

[Certificate of Service Omitted in Printing]

Technical Record, State Criminal Court

[9]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM, 18TH DAY OF JANUARY, 1968
MINUTE BOOK 65, PAGE 31

THURSDAY, JANUARY 18, 1968

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662
DEMURRER

STATE OF TENNESSEE, EX REL
WILLIE LEE HENDERSON, PETITIONER

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY,
RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner demurs to Respondent's answer on the grounds that it fails to address itself to the factual allegations in the petition and therefore is insufficient as a matter of law.

/s/ William Westermann
Court Appointed Counsel for Petitioner

[Certificate of Service Omitted in Printing]

Filed Jan. 18, 1968
Earl Hawkins, Clerk
By J. Shea, D. C.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

---

[10]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM 21ST DAY OF FEBRUARY, 1968
MINUTE BOOK 65, PAGE 182

WEDNESDAY,, FEBRUARY 21, 1968

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662
MOTION

STATE OF TENNESSEE, EX REL.
WILLIE LEE HENDERSON, PETITIONER

VS.

C. MURRAY HENDERSON, WARDEN,
TENNESSEE STATE PENITENTIARY,
RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

MOTION

Comes the petitioner and moves the Honorable Court:

1. To dispose of his demurrer to respondent's answer;

2. To dispose of the issue of legal sufficiency of petitioner's amended petition, which issue is raised by respondent's answer; and

3. To allow an early separate hearing on the issue of whether petitioner waived his right to challenge the constitution of the grand and petit juries.

/s/ William Westermann
Attorney for Petitioner

[Certificate of Service Omitted in Printing]

Filed Feb. 21, 1968
Earl Hawkins, Clerk
By J. Shea, D. C.

ORDERED THAT COURT STAND ADJOURNED UNTIL TOMORROW MORNING AT NINE O'CLOCK.

/S/ JOHN L. DRAPER, JUDGE

[11]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM 2ND DAY OF APRIL, 1968
MINUTE BOOK 65, PAGE 341

TUESDAY, APRIL 2, 1968

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662
ORDER
ALLOWING
STATE
TO
AMEND
ANSWER

STATE OF TENNESSEE, EX REL
WILLIE LEE HENDERSON, PETITIONER

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY,
RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

ORDER

It appearing to this Court that the State should be allowed to amend its answer in the above styled cause, IT IS ORDERED, ADJUDGED, AND DECREED by this Court that the respondent be allowed to file an amended answer.

/s/ John L. Draper
JOHN L. DRAPER, JUDGE

Approved for entry:

/s/ William Westerman
Attorney for Petitioner,
WILLIAM WESTERMANN

/s/ Robert S. Brandt
Attorney for Respondent,
ROBERT S. BRANDT

Filed: April 2, 1968
Earl Hawkins, Clerk
By J. Shea, D. C.

---

[12]

MINUTES, JANUARY TERM, 2ND DAY OF APRIL, 1968

4662
AMENDED
ANSWER
FILED

STATE OF TENNESSEE, EX REL
WILLIE LEE HENDERSON, PETITIONER

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY,
RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

An amended answer was received by the Court in this cause and marked filed this date.

Mr. Robert S. Brandt, Assistant Attorney General for the State.

(Copy of Amended Answer follows)

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

Technical Record, State Criminal Court

[13]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY TENNESSEE, DIVISION TWO

STATE OF TENNESSEE, ex rel
WILLIE LEE HENDERSON

Petitioner

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY
NASHVILLE, TENNESSEE

Respondent

NO. 4662

AMENDED ANSWER

(Filed April 2, 1968)

Respondent, C. Murray Henderson, for amended answer to the writ of habeas corpus filed against him in the above cause says:

The petitioner alleges that members of his race were systematically excluded from the Davidson County Grand Jury which indicted him. The respondent categorically denies that members of the Negro race were systematically excluded from the Davidson County Grand Jury.

Now having fully answered, the respondent prays that the petition for writ of habeas corpus filed against him in this cause be dismissed and that the petitioner be returned to him for further custody.

Respectfully submitted,

Technical Record, State Criminal Court

/s/ Robert S. Brandt
Robert S. Brandt
Assistant District Attorney

[Certificate of Service Omitted in Printing]

---

[14]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, MAY TERM, 6TH DAY OF MAY, 1968
MINUTE BOOK 65, PAGE 435

MONDAY, MAY 6, 1968

CAPTION
MAY
TERM
1968
DIV.
TWO

Pleas at the Court House in the City of Nashville, County of Davidson, State of Tennessee, it being the May Term, 1968, the first Monday, in May, 1968, and the 7th day of May, thereof, and one hundred ninety second year of American independence present and presiding the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee, when the following proceedings were had to wit:

Division Two of the Criminal Court of Davidson County, Tennessee, was duly opened by Walter M. Parrish and Frank M. Bess, Jr., officers of this Court, and prayer was offered by the Reverend Giles E. Lewis, Jr., Rector of St. Bartholomew's Episcopal Church.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

---

[15]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, MAY TERM, 6TH DAY OF MAY, 1968
MINUTE BOOK 65, PAGE 449

TUESDAY, MAY 7, 1968

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662 ORDER DENYING PRAYER FOR DISMISSAL OF PET.	STATE OF TENNESSEE, EX REL WILLIE LEE HENDERSON, PETITIONER VS. C. MURRAY HENDERSON, WARDEN, TENNESSEE STATE PENITENTIARY, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

ORDER

In this cause it is the opinion of the Court that the prayer of the District Attorney representing the respondent for a

dismissal of the petition for a writ of Habeas Corpus should be and is denied.

The cause will be set for hearing at an appropriate time.

This, the 7th day of May, 1968.

/s/ John L. Draper
JUDGE

Filed: May 7, 1968
Earl Hawkins, Clerk
By J. Shea, D. C.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

---

[16]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, SPETEMBER TERM, 9TH DAY OF SEPTEMBER, 1968
MINUTE BOOK 65, PAGE 754

MONDAY, SEPTEMBER 9, 1968

CAPTION SEPTEMBER TERM 1968 DIV. TWO	Pleas at the Courthouse in the City of Nashville, County of Davidson, State of Tennessee, it being the September Term, 1968, the second Monday in September, 1968 and the 9th day of September, thereof, and one hundred ninety third year of American independence, present and presiding, the

Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

Division Two of the Criminal Court of Davidson County, Tennessee, was duly opened by Mr. H. L. Demonbreun and Mr. N. L. Luther, officers of this Court.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

---

[17]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, SEPTEMBER TERM, 24TH OF OCTOBER, 1968
MINUTE BOOK 66, PAGE 152

THURSDAY, OCTOBER 24, 1968

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee, when the following proceedings were had, to wit:

4662	STATE OF TENNESSEE, EX REL
PETITION	WILLIE LEE HENDERSON
UNDER ADVISEMENT	VS.
	LAKE F. RUSSELL, WARDEN
	TENNESSEE STATE PENITENTIARY

PETITION FOR WRIT OF HABEAS CORPUS

Came the Attorney General who prosecutes for the State and the petitioner in person.

Thereupon, this cause was heard by the Court upon the petition for writ of habeas corpus and after having heard the proof and argument of counsel said petition was taken under advisement until a later date.

Mr. William S. Westerman, Attorney for Petitioner

Mr. Robert S. Brandt, Assistant Attorney General for the State.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

---

[18]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, SEPTEMBER TERM, 6TH DAY OF DECEMBER, 1968
MINUTE BOOK 66, PAGE 304

FRIDAY, DECEMBER 6, 1968

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

Technical Record, State Criminal Court

4662
OPINION

STATE OF TENNESSEE, EX REL,
WILLIE LEE HENDERSON

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE PENITENTIARY

PETITION FOR WRIT OF HABEAS CORPUS

OPINION

This petitioner has filed two previous petitions for habeas corpus since his imprisonment in the penitentiary but in neither of those two petitions did he see fit to raise the question included in this petition. The record discloses that he first obtained the idea of relying on the question of exclusion of Negroes from the jury from a newspaper article which showed that this question had been raised by another defendant and his lawyer in this county.

In this petition he raises the single question that there was a systematic exclusion of Negroes from grand and petit juries in Davidson County at the time he was convicted. The answer of respondent challenges the sufficiency of the petition, first on the ground that if there was such systematic exclusion it must be raised in a plea in abatement before trial and, secondly, it challenges the factual statements alleged in the petition.

This defendant was convicted on March 12, 1948 in this county of murder in the first degree and sentenced to serve ninety-nine (99) years in the penitentiary. He was at that time twenty (20) years of age. He entered a plea of guilty and

the petit jury was only sworn to assess the punishment. The question of his innocence was foreclosed by the guilty plea. He was represented by The Honorable Tom Ed. Murray, a reputable and learned member of the Nashville Bar, who was employed by the defendant's mother. He found no objection to his lawyer's conduct of his case.

While the legal question of waiver raised by the answer of the respondent could well be a valid one, the issue was not resolved on that question but an evidentiary hearing was had and the decision rests on the result of that hearing. The question is was there a systematic exclusion of Negroes from both grand and petit juries which violated his constitutional rights. This cannot be assumed but must be proven by the petitioner. The petitioner did not recall whether or not any Negro sat on the petit jury that assessed his punishment and, of course, he had no knowledge of the makeup of the grand jury that indicted him.

Certain census figures were made a part of the record but they are silent as to the number of eligible jurors by reason of age, either Negro or white. Petitioner Henderson called Judge Hart, a retired jurist of this county and the judge before whom the conviction was had, as a witness. We believe that the testimony of Judge Hart although it does show that relatively few Negroes served on the petit juries during the 1940's, that his testimony taken as a whole certainly negatives the idea of purposeful exclusion of members of the Negro race. The law under which this defendant was indicted and tried provided the same method of jury selection as is used currently in Davidson County and we have held there is no such exclusion resulting from the present system.

[20]

We conclude that there is absolutely no showing in the record before us that any segment of the community has been systematically or deliberately excluded by reason of race or color and we, therefore, conclude that there is no proof to establish the allegations of the petition and it must necessarily be dismissed.

This 6th day of December, 1968.

/s/ John L. Draper
John L. Draper, Judge

Filed Dec. 6, 1968
Earl Hawkins, Clerk
By: J. Shea, D. C.

Ordered that Court stand adjourned until Monday morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, SEPTEMBER TERM, 11TH DAY OF DECEMBER, 1968
MINUTE BOOK 66, PAGE 308

WEDNESDAY, DECEMBER 11, 1968

Court met pursuant to adjournment, presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662 MOTION

STATE OF TENNESSEE, EX REL
WILLIE LEE HENDERSON

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY

PETITION FOR WRIT OF HABEAS CORPUS

MOTION

Comes the petitioner and moves the Court to allow petitioner to place into evidence and make of record in this cause the following facts which are of record in the Davidson County Criminal Court Clerk's Office:

1. That petitioner was indicted on February 12, 1948 (Min. Book 40 Page 282).

2. That the Grand Jury which indicted petitioner was selected and impaneled by Judge Gilbert (Min. Book 40, Page 89).

Petitioner will file duly certified copies of said records when they are made available.

/s/ W. S. Westermann
W. S. Westermann
Attorney for Petitioner

[Certificate of Service Omitted in Printing]

Filed: Dec. 11, 1968
Earl Hawkins, Clerk
By: J. Shea, D. C.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

[22]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, SEPTEMBER TERM, 18TH DAY OF DECEMBER, 1968
MINUTE BOOK 66, PAGE 335

WEDNESDAY, DECEMBER 18, 1968

Court met pursuant to adjournment, presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662 ORDER

STATE EX REL WILLIE LEE HENDERSON

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY

PETITION FOR WRIT OF HABEAS CORPUS

ORDER

The parties having consented hereto and it appearing satisfactory to the Court, it is hereby ORDERED that petitioner's motion filed on December 11, 1968, moving the Court to place into evidence and make of record in this cause the following stated facts which are of record in the Davidson County Criminal Court Clerk's Office be sustained and granted and that duly certified copies of said records of same be made a part of the record in this cause:

1. That petitioner was indicted on February 12, 1948 (Min. Book 40, Page 282), and

2. That the Grand Jury which indicted petitioner was selected and impaneled by Judge Gilbert (Min. Book 40, Page 89).

/s/ John L. Draper
JUDGE, DIVISION TWO

Approved For Entry:

/s/ W. S. Westermann
W. S. Westermann
Attorney for Petitioner

/s/ Robert Brandt
Robert Brandt
Asst. District Attorney General

Filed: Dec. 18, 1968
Earl Hawkins, Clerk
By: J. Shea, D. C.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

State Criminal Court, Motion for New Trial

[23]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, SEPTEMBER TERM 6TH DAY OF JANUARY, 1969
MINUTE BOOK 66, PAGE 348

MONDAY, JANUARY 6, 1969

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662	STATE EX REL, WILLIE LEE HENDERSON
MOTION FOR NEW TRIAL	VS.
	C. MURRAY HENDERSON, WARDEN TENNESSEE STATE PENITENTIARY

PETITION FOR WRIT OF HABEAS CORPUS

MOTION FOR NEW TRIAL

Comes the petitioner and moves the Court for a new trial of this cause on the grounds that new evidence has been admitted by order of the Court on December 18, 1968.

/s/ W. S. Westermann
W. S. Westermann
Attorney for Petitioner

[Certificate of Service Omitted in Printing]

Filed Jan. 6, 1969
Earl Hawkins, Clerk
By: J. Shea, D. C.

Ordered that Court stand adjourned until Thursday morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

---

[24]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, SEPTEMBER TERM 10TH DAY OF JANUARY, 1969
MINUTE BOOK 66, PAGE 354

FRIDAY, JANUARY 10, 1969

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662
MOTION FOR NEW TRIAL OVERRULED

STATE OF TENNESSEE, EX REL
WILLIE LEE HENDERSON, PETITIONER

VS.

LAKE F. RUSSELL, WARDEN
TENNESSEE STATE PENITENTIARY,
RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

Came the Attorney General who prosecutes for the State. Thereupon, this cause was heard by the Court upon motion

of the Defendant to be granted a new trial on the hearing of the petition for writ of habeas corpus which motion was by the Court overruled.

To the action of the Court in overruling petitioner's motion for a new trial, petitioner excepts and prays an appeal in the nature of a writ of error to the next Term of the Court of Criminal Appeals of Tennessee sitting in Nashville, which was by the Court granted and the petitioner is allowed thirty days from this within which time to prepare and file his Bill of Exceptions.

Mr. W. S. Westerman, Attorney for Petitioner.

Ordered that Court stand adjourned until Monday morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

---

[25]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM, 13TH DAY OF JANUARY, 1969
MINUTE BOOK 66, PAGE 357

MONDAY, JANUARY 13, 1969

CAPTION
JANUARY
TERM
1969
DIV.
TWO

Pleas at the Courthouse in the City of Nashville, County of Davidson, State of Tennessee, it being the January Term, 1969, the second Monday of January, 1969, and the 13th day of January thereof, and one hundred ninety third year of our American independence, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

Mr. Frank M. Bess, Jr., Mr. Charles R. Hill, Mr. Walter M. Parrish, Mr. H. L. Demonbreun, Mr. James Jones and Mr. N. L. Luther, Deputies Sheriff of Davidson County, Tennessee were appointed by the Court to wait upon the Court as court officers for the January Term, 1969, Division Two, Criminal Court.

Prayer was offered by Mr. Steve North of the Harding Place Church of Christ.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

[26]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM, 14TH DAY OF JANUARY, 1969
MINUTE BOOK 66, PAGE 361

TUESDAY, JANUARY 14, 1969

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662
PAUPER'S OATH

STATE EX REL, WILLIE LEE HENDERSON

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY

PETITION FOR WRIT OF HABEAS CORPUS

A motion to appeal in forma pauperis was received by the Court in this cause and marked filed this date.

Mr. W. S. Westermann, Attorney for Petitioner.

(A copy of Pauper's Oath follows)

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

[27]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY
TENNESSEE, DIVISION TWO

STATE ex rel, WILLIE LEE HENDERSON VS. C. MURRAY HENDERSON, WARDEN, ETC.	NO. 4662

PAUPER'S OATH

(Filed January 14, 1969)

I, Willie Lee Henderson, do solemnly swear that owing to my poverty, I am unable to bear the expense of the appeal which I am about to commence in this cause and that I am justly entitled to the relief sought, to the best of my belief.

/s/ Willie Lee Henderson
Willie Lee Henderson

Sworn to and subscribed before me this 27 day of Dec. 1968.

/s/ Jimmy H. Rose
Notary Public

My Commission Expires: 24 Jan. 1970

[28]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM, 7TH DAY OF FEBRUARY, 1969
MINUTE BOOK 66, PAGE 448

FRIDAY, FEBRUARY 7, 1969

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662	STATE OF TENNESSEE, EX REL
BILL	WILLIE LEE HENDERSON
OF EXCEPTIONS	VS.
FILED	LAKE RUSSELL, WARDEN
	TENNESSEE STATE PENITENTIARY

PET. WRIT OF HABEAS CORPUS

Came the Attorney General who prosecutes for the State and the Petitioner in person, who by his attorney tenders this his Bill of Exceptions to the judgment of the Court in dismissing the petition for writ of habeas corpus, which was by the Court signed, sealed, and ordered made a part of the record.

Mr. William S. Westermann, Attorney for Petitioner.

Mr. Robert S. Brandt, Assistant Attorney General for the State.

Ordered that Court stand adjourned until Monday morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

[29]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM, 12TH DAY OF FEBRUARY, 1969
MINUTE BOOK 66, PAGE 467

WEDNESDAY, FEBRUARY 12, 1969

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662
MOTION TO BE RELIEVED AS COUNSEL FILED

STATE EX REL WILLIE LEE HENDERSON

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY

PETITION FOR WRIT OF HABEAS CORPUS

MOTION

Comes now the Court appointed counsel for petitioner and moves the Court to allow his withdrawal as counsel on the grounds that his partner, the Honorable Robert H. Dedman, acts as Special Counsel for the State of Tennessee in habeas corpus matters in the Federal Courts, and therefore a conflict of interest on the part of said Court appointed counsel appears to exist.

/s/ W. S. Westermann,
Court Appointed Counsel
For Petitioner

I have today delivered a copy of this motion to the Honorable Robert Brandt, Assistant Attorney General.

/s/ W. S. Westermann

Filed: Feb. 12, 1969
Earl Hawkins, Clerk
By: J. Shea, D. C.

---

[30]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM, 12TH DAY OF FEBRUARY, 1969
MINUTE BOOK 66, PAGE 467

4662 STATE EX REL.,
ATTORNEY WILLIE LEE HENDERSON
RELIEVED
VS.
C. MURRAY HENDERSON, WARDEN

PETITION FOR WRIT OF HABEAS CORPUS

Thereupon, this cause was heard by the Court upon motion of Mr. William S. Westermann to be relieved as counsel for the petitioner which motion was by the Court granted.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

[31]

BILL OF COST

BILL OF COST	32 pages at 60¢ per page	$19.20
	Appeal	.75
	Bill of Cost	.50
	Certificate and Seal	.75
	TOTAL	$21.20

---

[32]

STATE OF TENNESSEE
COUNTY OF DAVIDSON

CERTIFICATE AND SEAL

I, Earl Hawkins, Criminal Court Clerk of Davidson County, State aforesaid, hereby certify that the foregoing is a true and perfect transcript of the record in the case of Willie Lee Henderson v. State of Tennessee on a Petition for Writ of Habeas Corpus, as the same appears of record at office in Nashville, Tennessee.

Witness my hand and seal of Court this 12 day of March, 1969.

/s/ Earl Hawkins
CRIMINAL COURT CLERK
DAVIDSON COUNTY, TENNESSEE

A. 80

State Criminal Court, Bill of Exceptions

IN THE CRIMINAL COURTS OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE DIVISION TWO

(Filed February 7, 1969)

STATE OF TENNESSEE, EX REL
WILLIE LEE HENDERSON — PETITIONER

VS — NUMBER 4662

LAKE RUSSELL, WARDEN
TENNESSEE STATE PENITENTIARY — RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

For the Petitioner: Mr. William Westermann

For the Respondent: Mr. Robert S. Brandt
Asst. Dist. Attorney General

BEFORE THE HONORABLE JOHN L. DRAPER, JUDGE

PETITIONER'S BILL OF EXCEPTIONS

[3] In the Criminal Courts of Nashville and Davidson County, Tennessee, before The Honorable John L. Draper, Judge, October 24, 1968, the following proceedings were had, to wit:

The Court: "I don't think it's necessary for you to read into the record the Petition, nor is it necessary for you, Mr. Brandt, to read the Amended Answer. That brings us down to the proof, gentlemen."

Mr. Westermann: "If Your Honor please, I would like to introduce this certified copy of the minute record from the Criminal Court Clerk's office, which is the minute record of Petitioner's conviction on March 12, 1948."

The Court: "I take it there will be no objection to that. Mark it filed, Mr. Clerk, as Exhibit Number One to the Petitioner's case."

WILLIE LEE HENDERSON, the petitioner, took the witness stand and testified as follows, after being first duly sworn:

DIRECT EXAMINATION

Questions by Mr. Westermann:

Q Would you state your name, please?

A Willie Lee Henderson.

[4] Q And your present age?

A Forty-one.

Q What is your race?

A Colored.

Q Do you recall the date of your conviction?

A Yes, sir.

Q And that was March 12, 1948?

A March 12. Yes, sir.

Q Have you been confined in the state penitentiary in

Nashville since that time?

A I have.

Q What was your age, Mr. Henderson, at the time of your trial?

A I was twenty years old.

Q What was the name of the lawyer who represented you at that time?

A Mr. Tom Ed Murray.

Q Was he employed by you, or appointed to represent you by The Court?

A He was employed by my mother.

Q What was your educational background at the time, Mr. Henderson?

A I was stopped in the sixth grade.

[5] Q How old were you at the time you quit school?

A I quit school at fifteen.

Q Were you ever gainfully employed?

A Yes, sir, I worked at a brick yard. Bush's brick yard.

Q What year did you work at Bush's brick yard.

A When I was around about sixteen or seventeen.

Q Did you work there up until the time you were convicted of this crime?

A No, sir.

Q What did you do after you left Bush's brick yard?

A I worked around a funeral home, after I left Bush's brick yard.

Q Did you reside with your mother at that time? Did you live with your mother?

A Yes, sir.

Q Where was your father?

A My father was dead.

Q Who else was in the family?

A Aunties and half sisters.

Q They all lived in the same house?

A Yes, sir.

Q Who lived in the house with you and your mother?

A Nobody but me and my mother and stepfather.

[6] Q Who is your stepfather?

A That's Ephram Hall.

Q What's his occupation? Where did he work?

A He worked at the brick yard.

Q Do you know in what capacity?

A Yes, sir.

Q What was his job?

A He made bricks.

Q Immediately prior to and at the time of your trial and your conviction, were you informed by Mr. Tom Ed Murray concerning your rights as they related to the constitution of grand and petit jurors?

A No, sir.

Q He didn't tell you anything about it?

A No, sir.

Q Did you have any independent knowledge of the means of selection, and your rights relative to grand and petit jurors?

A No, sir.

Q Did your lawyer ever ask you whether or not you wished to challenge the constitution of the grand jury on the basis that Negroes were excluded from it?

A No, sir.

[7] Q Did he ever advise you that anything you did or did not do would effect your right to raise this issue? Did he ever talk to you about this at all?

A No, sir.

Q I think you stated you had no knowledge of this yourself?

A That's right.

Q Did you have any knowledge that Negroes did not serve on the grand juries or petit juries of Davidson County?

A No, sir.

Q At the time you were convicted?

A No, sir.

Q And your lawyer never mentioned anything to you about this right to properly constitute the grand or petit juries?'

A No, sir.

Q How old are you now, Mr. Henderson?

A Forty-one.

THE COURT: "Did you go to trial on a plea of guilty, or not guilty?"

A I didn't plead guilty at all.

THE COURT: "You plead not guilty, then?"

A Yes, sir.

THE COURT: "And the jury convicted you on [8] a plea of not guilty?"

MR. WESTERMANN: "Your Honor, I am not sure that is true. I think the record shows that he did plead guilty. Does the record indicate that he plead guilty?"

THE COURT: "Why did you tell me that you did not plead guilty, when the record shows that you did plead guilty?"

A My lawyer entered that.

THE COURT: "You know whether you went to trial on a plea of guilty, or not, don't you?"

A I didn't plead guilty. He pleaded me, and entered the plea then.

THE COURT: "What you are saying, then, is that your lawyer entered your plea of guilty for you?"

A Must have.

THE COURT: "Don't say 'must have.' Is that what you are saying?"

A Yes, sir, I am saying Mr. Tom Ed Murray.

THE COURT: "I understand who it was, but did your lawyer enter your plea of guilty for you?"

A Yes, sir.

THE COURT: "But he did it with your consent?"

A No, sir.

[9] THE COURT: "Mr. Westermann, my only purpose in asking those questions is touching his credibility here. If he doesn't know anything, I wonder what faith I can give to what he says."

(Mr. Westermann continuing)

Q Were there any Negroes on the jury which convicted you?

A No, sir.

CROSS-EXAMINATION

Questions by Mr. Brandt:

Q Mr. Henderson, you plead guilty, is that right?

A Sir?

Q You plead guilty?

A Plead guilty.

Q Was it in this courtroom here?

A I was tried in Division One.

Q Did you sit down at the table and stand up and say you plead guilty?

A No, sir.

Q Did your lawyer say you plead guilty?

A My lawyer, Mr. Tom Ed Murray, all I know that happened, I was in a little room and came out and they said he is guilty of first degree murder. That's all I know, and they gave me ninety-nine years. That's all I know, and I didn't plead guilty. I didn't plead at all.

[10] Q Did you file a previous Writ of Habeas Corpus on this question?

A I have had a habeas corpus on it.

Q Has that been granted for the fact that you were inadequately represented, or tricked into going to the penitentiary?

A Well, they denied it.

Q Who were you charged with killing in this case we are talking about now?

A Mr. William H. Cotton.

Q What is his relationship to you?

MR. WESTERMANN: "Your Honor, I am going to object to this type of questioning."

A He wasn't any relationship to me.

Q Stranger?

MR. WESTERMANN: "I don't think this has any relevancy to the issues in this proceeding."

MR. BRANDT: "I was trying to find out a little something about the case."

THE COURT: "Well, I don't believe that would help."

Q What sentence did you get?

A Ninety-nine years.

[11] Q Do you know of your own knowledge whether there were any Negroes on the grand jury which indicted you?

A Do I know?

Q Yes, sir.

A As far as I know, there wasn't any. In fact, I check and I found out there wasn't any.

Q As far as you know, there were not?

A Yes, sir.

Q As far as you know, there could have been, too?

A Well, according to the list I got, there wasn't any.

Q According to the list you got?

A According to the people that told me about it, there wasn't any.

Q Did people out at the penitentiary talk to you about it?

A People that came out there talked to me about it.

Q Who was that?

MR. WESTERMANN: "If Your Honor please, I object to this."

THE COURT: "Gentlemen, I want to know. He has filed two petitions here before, and he has never raised this question, and The Court is interested to know how he got this information, that now he files a petition. I think it is proper for him to ask him that."

[12] Q Aside from your lawyer, who are you telling The Court has told you that there were no Negroes on the grand jury?

A I got it from a list in the paper once, in a case that was out here in court, and I had a lawyer check on it.

Q Which lawyer?

A Mr. Barrett. He was on my other petition in federal court, and he raised the issue, and another one told me that he would put it in my petition for me, later on, then, I filed this other petition myself, in prison.

THE COURT: "Now are you saying that this question has been raised in a petition to the federal court, and your lawyer put it in?"

A No, sir. I said I had a petition in federal court, and the lawyer I had in federal court told me about the issues of systematic exclusion.

THE COURT: "Did you put it in your petition?"

A I put it in that petition this time.

THE COURT: "I am talking about the petition you had in federal court?"

A No, I didn't have it in there.

THE COURT: "Why didn't you put that in there?"

A Because the petition came through the first circuit

[13] court, and they denied it to the court, and it never was put in there.

THE COURT: "I am talking about the case now filed in the federal court. Not filed in the circuit court. In the federal court."

A The same case was in the federal court and in the circuit court. It went to the federal court, and they denied it in the State Supreme Court, and I appealed it to the District Court, and the Sixth Circuit Court of Appeals.

THE COURT: "Oh, then you appealed that case?"

A On my petition.

Q The question of systematic exclusion of Negroes from grand and petit juries was not raised before? Is that right?

A It was not raised in my other petition?

THE COURT: "In your other two petitions?"

A That's right.

Q You are saying that the reason you know there were no Negroes on the grand jury which indicted you is because you read it in the newspaper?

A Well, they had a case in the newspaper, that was before I filed this petition, and I got it from there, and I started getting the laws, and different things, to put in my petition and filed it.

Q Have you been going to school at the penitentiary

[14] A No, sir, I haven't.

Q The sixth grade is as far as you have gone?

A That's right.

Q In your research, did you come across the case called Strouder versus West Virginia?

A I don't recall it.

MR. WESTERMANN: "If Your Honor please, I can't understand the relevance of this kind of questioning to the issues presented of systematic exclusion of Negroes from

the grand jury, or how it is related at all to the outcome."

MR. BRANDT: "If Your Honor please, I am trying to determine when he found all of this out."

MR. WESTERMANN: "What relevance does that have, Your Honor?"

THE COURT: "I think that is relevant. I am interested in that inquiry."

Q Did you come across that case? Does the name mean anything to you?

A I don't recall it. I come across many of them, and I don't remember that one.

Q Mr. Henderson, you testified in the jury box
[15] what members of the jury sat in your case. There were no Negroes at all?

A On the petit jury?

Q Right.

A I had an indictment. The indictment showed that.

Q The indictment showed there were no Negroes on the petit jury?

A The minutes of the pages in the court. I checked that. I had my mother to check that.

Q Do the minutes of the court have people listed as white and colored?

A Sir?

Q Do the minutes of the court have that on their list, like opposite a man's name, do they have black man or white man?

A No, but they had all the names on there, and she checked the names.

Q Your mother checked all the names on there, and found out they were all white people?

A Yes, sir. She had all of that checked.

THE COURT: "Did you have the same lawyer in both of your other two petitions for writs of habeas corpus?"

[16] A No, sir.

THE COURT: "What was the name of your lawyer in your first two petitions?"

A The first one was denied.

THE COURT: "I know, but what was your lawyer's name?"

A My lawyer was Mr. Ellis, the first lawyer I had.

THE COURT: "Mr. who?"

A Ellis. Mr. Leroy Ellis, and when I went to federal court, it was a lawyer named Mr. Bass, or something like that. They appointed him in federal court.

THE COURT: "But you filed a second petition in the circuit court."

A Yes, sir.

THE COURT: "Who represented you in that one?

A In the second petition I filed, the first petition I filed was denied. I didn't have no counsel. The second petition was Mr. Leroy Ellis."

THE COURT: "In the first petition, no lawyer?"

A That's right. In the second petition it was Mr. Leroy Ellis, and I appealed it to the federal court and they appointed me another counsel."

Q Did you know, Mr. Henderson, that your
[17] lawyer, Mr. Lee Ellis, was a leader in the American Civil Liberties Union?

MR. WESTERMANN: "Your Honor, I again object that this line of questioning has no relation to the issues in this case."

MR. BRANDT: "If Your Honor please, I am trying to show the seriousness of this case. I think it can be shown that this man had at one time a lawyer who Your Honor knows is a champion in these causes, and that lawyer didn't even see fit to raise this question."

MR. WESTERMANN: "How is that relevant?"

THE COURT: "I am going to let him answer that, Mr. Westermann."

MR. WESTERMANN: "Please note an exception."
(Mr. Brandt continuing)

Q Did you know that Mr. Ellis was active in American Civil Liberties Union?

A After that, I did.. After they appointed him to represent me.

Q Did you know that the American Civil Liberties Union is pursuing another case out of this court right here involving the same question?

A No, sir, I didn't know that.

Q Were you charged with killing a white man,
[18] or a black man?

A I was charged with killing a white man.

MR. WESTERMANN: "I object to that, Your Honor. It is not the question of whether he really killed anybody, but the question that it was worded that way."

MR. BRANDT: "If Your Honor please, this man is not innocent until proven guilty. He is guilty at this stage of the proceedings."

THE COURT: "Oh, yes, there isn't any question about that."

MR. WESTERMANN: "That has no relevance in this hearing."

MR. BRANDT: "I am trying to establish if there was some prejudice involved here. I don't like to see a man convicted on account of racial prejudice any more than anyone else does. It goes against my entire moral fiber."

THE COURT: "I think it is competent. The whole contention is racial prejudice, and that's all it is."

MR. WESTERMANN: "That's true, it is a question of systematic exclusion of Negroes from juries which eventually gets down to prejudice, but how did this petitioner have knowledge of prejudice back in 1948? I don't see that his knowledge of it or lack of knowledge of it is relevant."

[19] THE COURT: "I will have to determine that when I get the facts."

(Mr. Brandt continuing)

Q Do you think that you were prejudiced by not having Negroes sit in the jury box?

MR. WESTERMANN: "I object to that, too, and I object to this whole line of questioning, and please note my exceptions."

THE COURT: "Your exceptions are noted." (To the witness) "What is your answer?"

A Well, at this time, I will say that I was. At that time, I didn't know, because I didn't know anything about that. At that time, I was in court, and I didn't know anything about it.

MR. WESTERMANN: "If Your Honor please, I would like to note an objection to this matter on another ground. It gets to the issue of whether or not he feels that he was done some wrong by the action of that grand and petit jury, and that's not in issue, either."

THE COURT: "I am not so sure about that, now, Mr. Westermann."

MR. WESTERMANN: "When it gets to the question of whether or not he was innocent or guilty of that act,

[20] that testimony is not competent."

THE COURT: "There is no question about his guilt or innocence. He is asking him now if he thinks, and I think it is competent, whether or not at that time he was in any way prejudiced by the fact that there were no Negroes that sat on that jury."

MR. WESTERMANN: "Is Your Honor overruling my objection?"

THE COURT: "Yes, sir. I think we are now down to the heart of it."

(Mr. Brandt continuing)

Q Mr. Henderson, I just want your truthful answer.

You will not offend me or anybody else by it.

A Well, it's like I said. I said at that time, I didn't know, but now, since I have found out these things, I feel that I was.

Q Looking back on it, you think you were?

A Yes, sir.

Q And if it developed that there were no Negroes on the grand jury, you would think the same thing about that, looking back on it, you think that hurt you, too?

A Yes.

Q Of course, if there were Negroes on the
[21] petit jury, you would know that, because they sat right here in the box?

A At that time, I didn't know anything about it.

Q But I mean you could tell by looking at them whether they were white men or black men, couldn't you? Is that right?

A Yes, that's right.

Q But as far as the grand jury is concerned, you never saw anybody on that grand jury, and couldn't identify them or testify who they were, could you?

A No, I couldn't.

Q The lawyer who represented you was paid by your mother. Is that right?

A Yes, sir. That's right. Hired by my mother.

Q Did you ever talk with your mother about the fact that you were not satisfied with your lawyer, or were not satisfied with the representation he was giving you?

MR. WESTERMANN: "I object to that, Your Honor. I would like to limit the state to the issue of systematic exclusion of Negroes from the jury, the grand jury and the petit jury, and the answer to that question has no relevance whatsoever."

MR. BRANDT: "That question has relevance, if Your

[22] Honor please."

THE COURT: (Interposing) "I would like to know that. I think it is proper for him to make that inquiry."

MR. WESTERMANN: "Are you talking about the time he was convicted, or what time?"

THE COURT: "The day of the conviction."

MR. WESTERMANN: "I still object to that line of questioning."

THE COURT: "Well, I am going to overrule it."

MR. WESTERMANN: "Please note my exceptions."

(Mr. Brandt continuing)

Q Did you express to your mother your desire to have a lawyer other then Mr. Murray?

A No, I never did express to her.

Q In other words, you were satisfied with the representation Mr. Murray gave you?

A Well, my mother hired him. All I know, he was supposed to have been representing me, and as far as knowing anything about the law, at that time I didn't know anything about the law.

THE COURT: "He is not asking you about the law. He is asking you about one thing. Were you satisfied with the representation Mr. Murray gave you, or were you dissatisfied with it?"

[23] A I had to be satisfied, it was my mother that hired him.

THE COURT: "No, sir, you didn't have to be satisfied. We are trying to determine that. Were you satisfied, or were you dissatisfied?"

A It's all I could be, was satisfied.

THE COURT: "All right. Can it be said that you raised no objection to your mother about it? Is that right?"

A That's right.

At this time, the petitioner withdrew from the witness stand.

MR. WESTERMANN: "If Your Honor please, at this time I would like to introduce the affidavit of Mr. Tom Ed Murray, who represented the petitioner."

THE COURT: "All right. You may read it."

At this time, the affidavit was read by Mr. Westermann as follows:

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIVISION TWO

STATE OF TENNESSEE, ex rel
WILLIE LEE HENDERSON
Petitioner

vs. No. 4662

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY
NASHVILLE, TENNESSEE
Respondent

[24]

AFFIDAVIT

Tom Ed Murray, who after being duly sworn according to law, deposes and says that:

1.

I represented petitioner herein when he pleaded guilty to the crime of first degree murder which plea resulted in a conviction and sentence now being served. I had been employed by petitioner's now deceased mother.

11.

I had no knowledge at the time the plea of guilty was entered, nor have I any present knowledge, that members of petitioner's race had been systematically excluded from service on the Davidson County Grand Jury, either from

the grand jury which indicted petitioner or from grand juries prior to that grand jury.

III.

I had no knowledge at the time the plea of guilty was entered, nor have I any present knowledge, that members of petitioner's race had been systematically excluded from service on Davidson County petit juries, either from the panel from which the jury which sentenced petitioner was selected or any earlier panels.

[25] IV.

I have never been aware of any irregularity in the method of selection of grand or petit juries, particularly in regard to systematic exclusion of members of any race, so there was never occasion to advise the petitioner of any rights that he may have had in the composition or method of selection of the membership of grand and petit juries, nor did I advise petitioner that any action by me for failure to act would waive or affect his right in regard to the composition or method of selection of grand or petit juries.

V.

I am not now aware and was not aware at the time of petitioner's trial that petitioner had knowledge of any of the matters referred to in the previous parts of this affidavit.

If petitioner had any knowledge of any irregularities in the composition or method of selection of grand or petit juries, either at the time of trial or subsequent thereto, he never made this knowledge available to me.

Further deponent saith not.

(s. Tom Ed Murray)
Deponent

[26] STATE OF TENNESSEE
COUNTY OF DAVIDSON

Subscribed and sworn to before me this the 23rd day of February, 1968.

(s. Mary L. Brackman)
Notary Public

My commission expires 8-17-68

THE COURT: "Let it be marked filed, and it will become a part of the record."

MR. WESTERMANN: "Your Honor, I would like to bring to The Court's attention, although you are probably aware of the fact, that the grand jury selection in 1948 was controlled by Tennessee Private Acts of 1947, Chapter 53, and also petit jury selection was controlled by that. I would like for that to be made a part of the record, and also the qualifications required for jury service, which is controlled by TCA 22, Section 101. It requires that they be citizens of the United States and residents of Tennessee, and in the county for twelve months prior to service."

THE COURT: "I think you are exactly right about those things."

MR. WESTERMANN: "And at this time, I would [27] like to introduce information from the Board of Census in Washington relating to the population of Davidson County, the Negro population of the county for 1940 and 1950, and the population of the persons twenty-one years and older for 1940 and 1950, with information relative to how many were white and how many were not white, and the total population. This is certified by the Director of the Census."

THE COURT: "All right, sir."

MR. WESTERMANN: "The total population in 1940 and 1950 for Davidson County, Tennessee, 1940 was 257,267. The total white population for that year was 200,454. The total non-white population was 56,813. In 1950 the total population was 321,758, of which the white population was 257,289, and the non-white was 64,465. The population twenty-one years and over for 1940 and 1950, the total population was 168,337, of which 129,868 were white and 38,469 were Negro. In 1950 the total population twenty-one years old and over was 211,930, of which the white population was 168,706, non-white 43,224."

THE COURT: "Mark it filed, Mr. Clerk, and let it become a part of the record."

At this time, Judge Chester K. Hart was called by the petitioner, took the witness stand, and his oath
[28] being waived, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Westermann:

Q Would you state your name, please, sir?

A Chester K. Hart.

Q And your age?

A Eighty-five.

Q And your address, sir?

A 2509 Oakland Avenue.

Q Would you state to The Court information concerning your years of service as Criminal Court Judge of one of the criminal courts of Davidson County? In what year did you begin service?

A In 1922.

Q When did you retire?

A In 1958.

Q Was there another Davidson County Criminal Court at that time, sir?

A Yes. When I went on the bench, there were two criminal courts.

Q Who was judge of the other criminal court?

A Judge M. DeBow.

[29] Q This was in 1922?

A Yes. Now, the court was created in 1920. Judge Gerrard was appointed. I ran against him, and he was on the bench for two years, and I went on. There was just one criminal court up to that time, and from then on, two, up until right recently.

Q Who was the judge of the other court from the years 1943 through 1953?

A Judge Gilbert was on for twenty-six years, I believe. Judge Blackart was on——

Q I understand Judge Gilbert retired in 1958. Is that correct?

A Yes.

Q And he was judge prior to 1943?

A I think so. I believe he was, twenty-six years, I believe.

Q Judge Hart, would you tell The Court, please, the method of selection of grand jurors which you employed after 1947?

A After 1947, the legislature changed the law, and the judges were not limited to the list furnished by the jury commission and the judges could select whomever they thought would make good grand jurors, and we were not in any way, as I recall, limited in our judgment on the matter. We could use our best judgment. That's the way I recollect it.

Q Would you state to The Court, please, the

[30] method of selection which you employed during the

years from 1947 until 1953? The grand jury.

A The way I did, from 1947, I started out when it was the responsibility of wholly mine, and I was acquainted with people all over the county, and I tried to select people that I thought would give everybody a fair hearing and people that felt the responsibility of doing things right, and I selected men that way, that I thought were best. Sometimes, when I would get the jury list, if I found people on there that I thought would make good grand jurors, I selected some from there. I used my own judgment as to what I thought would be the best panel of jurors that I could get. I did do this. I tried to get on various occupations, and things of that kind, so there would be a general knowledge in the jury of most anything that might come up. The court, of course, couldn't do much toward saying what the grand jury did. We had no control over them, and they could do whatever they thought was proper, so far as whether they indicted or not. We tried to get men we thought would be fair to everybody.

Q Is it a correct statement that you generally selected those persons whom you knew?

[31] A Well, I knew them, or knew of them. I wouldn't say that I knew everybody on the grand jury before I put them on, but I had information about them, what kind of people they were, before they went on the grand jury. I didn't select anybody at random for the grand jury.

Q And this was the method of selection that you employed from 1947 up through 1953?

A 1958.

Q Until 1958?

A Yes.

Q Do you recall ever selecting a Negro to serve? Let me ask you this. Was there only one grand jury in

Davidson County at any one time?

A There was only one grand jury at any time in Davidson County.

Q How was the responsibility for selecting the grand jury divided up among the two criminal court judges?

A For some time, and I don't know just how long it was, the two judges selected them. One would select part of them and the other would select part of them. They rotated in the selection of the foreman of the grand jury, and at that time they were taken altogether off of the jury list, as I remember.

Q This was probably 1947, then?

[32] A Yes. From the time I started in down at the old court house, for a while, and I don't know when they changed it from the time when the judge selected the foreman, they changed it so he selected the whole grand jury. I don't know what date that was.

THE COURT: "The Acts of 1947 make it the duty of Division One and Division Two to alternate in the selection of the grand jury."

A Before that time, each one selected some off of the list.

Q So after 1943, you selected half of the grand jury and Judge Gilbert selected half?

A No, after 1947 he would have one term, and we alternated.

Q Given a particular grand jury, one judge selected all the members of that particular jury?

A In alternate terms, yes.

Q One grand jury was selected wholly by one judge, and the next grand jury would be selected wholly by the other judge?

A Yes.

Q And this practice was instituted in 1947?

A In 1947.

Q Do you recall having selected a Negro to serve on any of the grand juries?

[33] A No, I don't think I did. I will make an explanation of that. It wasn't a question of whether he was black or white. As I said a while ago, I selected grand juries that I thought would give everybody a fair deal all the way through and a grand jury that if I was charged, I would have wanted to pass on mine. I felt when they put that obligation on me, saying it was up to me to select the grand jury, that I had the obligation of selecting one that would be fair to everybody, and that's what I tried to do. If I remember correctly, I don't think I put any Negroes on the grand jury, because you asked me a question a while ago, did I know everybody on the juries. I grant you, I didn't know everybody on the grand jury before putting them on, but I knew their reputation and the kind of people they were, and I selected—well, I was after the good people for the grand jury, and I didn't put anything on there but the best.

Q To the best of your knowledge, who was the first Negro grand juror selected in Davidson County after 1940?

A The first I remember was H. H. Walker.

Q I say after 1940. Do you recall any serving on the grand jury prior to 1940?

A No. I can explain that to you to some extent.

[34] Not about on the grand jury, but for a long time when colored people were——

Q (Interposing) Excuse me a moment, but I am getting to the petit jury in a moment.

A I was getting back to that myself. The judges had nothing to do with who was on the list. The jury commission had their responsibility to select people, and they made out the jury list. It was, at one time, at first the jury list,

after being gotten out, that was for the same jury commission selected the circuit court jurors as well as the jurors that were to be used in the criminal court. The court officers, at that time, were given the lists. They had six court officers, and they were put in different localities. One would have one section and another would have another, that way, and they then returned to the court the list to show those that had been found, or had not been found, or who were dead, or had moved, and things of that kind, and then the list would be turned over to us, and as I understood my duty at that time in the selection of jurors, was to try to select jurors from every section of the county and from no particular industry, or things of that kind. Then we took the list and looked them over, or I did. I don't know whether Judge Gilbert did, or not. But if I found
[35] on that list anybody that I knew was not fit for jury service, and if I knew that if he was summoned to come in that I wouldn't let him serve, I struck his name off the list.

Q What criteria did you use to make that conclusion, that they were unfit?

A Well, mostly criminal, and the reputation that they had. Probably I didn't know what some of them were, but if they had a reputation of being bootleggers, or working in the numbers game, or gamblers, or things of that kind, I struck them off, because I wouldn't let them serve if they came in. One reason for that, as I understood it, when the list had been made out, before it became permanent, it was supposed to be turned over to the judges to do the very thing that I did at that time, that I didn't have the opportunity to do before, because the jury lists were made out such a short time before they had to draw the jury that they didn't turn it over to the judges on some occasions for that, and so when they were summoned I took them

off, and I didn't summon them again.

Q Do you remember the year when Dr. H. H. Walker first served?

A No, I don't.

[36] Q Can you remember within three or four years? Can you say approximately what year it was?

A No, I don't know. I would have to guess, and my guess wouldn't be any good.

Q Do you think it was after 1947?

A Yes, I know it was after 1947. I am pretty certain of that.

Q Dr. H. H. Walker is a Negro, and he is the first Negro you recall serving?

A I believe I am right about it, but you can look up the records and get the absolute facts.

Q You covered a question in answering a previous question. The method of the selection of petit jurors which you employed, and without repeating that, I would like to try to get the point in. When you finally got a group of people from which you selected a panel of actual jurors to be selected, how many people would it take to get the panel?

A I told you twenty-four, I thought, but it was twenty-one.

Q So you eventually select a group of twenty-one people?

A Oh, yes. Along at the last there, we had jurors for three weeks. First, we selected for a whole term. We would send the list out to the officers, and we would then select four panels of twenty-one, each one of

[37] us.

Q You selected four panels, and this would cover the whole term?

A Yes, we would select four panels, some for the three weeks, and then another, and then another.

Q This was for the whole term?

A Yes. That would take up the whole criminal court. The jurors, after being brought in court, served in both divisions. They were not limited to this court, or over there.

Q Back in 1922, in the beginning of your service as criminal judge, were any Negroes on any of the four groups?

A There wasn't any four groups back there. Just one.

Q Out of the groups from which you did select the twenty-one.

A I don't know.

Q When did you start selecting four groups of twenty-one?

A When the jury was limited to three weeks. At one time, you would select them for the whole term.

Q Do you remember when this change took place?

A No. The law changed it. We didn't.

Q Presuming it was changed in 1947, back in 1922 and up until 1947, were Negroes present among these panels from which the actual trial jurors were selected?

[38] A Negroes were on the lists, if that's what you mean.

Q How did you know that?

A Well, I think, if I remember correctly, back earlier they were marked colored. I believe they were. I am not certain. I think at one time, the jurors were marked as colored or white. There was no harm to that, but it was "John Jones, colored," or "John Jones, C." That's the way I remember it. Back in those early days, I don't remember whether they were on the jury list or not. I had nothing to do, at that time, with the selection of the jury. They were already selected, as far as I remember, and that went on for a number of years.

Q Do you recall seeing Negroes in these groups of

twenty-one from which the actual trial jurors were selected?

A They came in. A lot of them wanted off, and some of them would serve.

Q Back in 1922?

A Oh, no.

Q I am talking about 1922 until approximately 1947.

A That's what I had in mind. That's what I was trying to tell. We didn't have four juries.

Q I am talking about the panels selected from 1922 until 1947. Were Negroes represented?

[39] A Yes. There were Negroes on them.

Q In 1922?

A No, I don't remember that. My opinion is there weren't any. I don't know.

Q What about 1947?

A There were Negroes on there before 1947.

Q In the panels from which the jurors were selected?

A Yes.

Q The actual jury trial jurors?

A Yes.

Q Do you remember how many?

A Are you talking about that were selected, or that were on the——

Q That were actually on the panel. I am talking about the actual panels from which the twelve people were selected to try cases. Were there Negroes in that group, prior to 1947?

A I don't know when the Negroes started to serve. For a long time, you couldn't get one to serve, and if an officer tried to serve a subpoena on them, they were all afraid he was trying to arrest them, or something, and they would say they didn't live there. I was told that by the officers when they would go out to get a witness, particularly, or something of the kind, the people wouldn't

[40] tell them. They would ask, "Does John Jones live here?" They would say, "No, sir, I don't know him," and they couldn't get any information. We had no control of that.

Q From the panels from which the active twelve were selected, were there Negroes on those panels?

A Yes. We selected them. Yes.

Q Prior to 1947?

A No, I don't remember when they first began to be put on. I don't know whether they were in the jury box or not.

Q Do you recall whether it was about the time that H. H. Walker first served as grand juror?

A I am of the opinion it was some time before that.

Q Do you recall when Negroes started to appear on the jury panel from which the actual twelve were selected?

A Well, no.

Q Can you recall the actual number of Negroes that you saw on one of those panels?

A No, I didn't try to count that.

Q Do you think it was more than four?

A Do you mean on the panel that was furnished me?

Q From the panel that was furnished you from which twelve people would be selected to try a case.

[41] A The five hundred?

Q No, I am not talking about the five hundred, Judge Hart. I am talking about the actual group of people from which twelve were selected to try a particular case. There were a group of jurors, and from that group an actual trial jury of twelve would be selected to try a case. This is the group I am talking about. I have been calling that the jury panel, I don't know whether accurately so, but I am talking about the actual jury of twelve that would be selected to try a case. In that final group from which

the twelve were selected, were Negroes present?

A Yes. Let me explain this to you. Judge Gilbert, after selecting the twenty-one jurors for the term, had what he called jury number one. When he opened court they would bring in jury number one. In my division, I would tell the officer, "Get me a jury." I didn't know who was coming or who didn't come. There were colored people on the jury, usually. Not too many of them, because sometimes in selecting these four we would have colored people on the second, third, or fourth jury and they never did come back.

Q How many Negroes were on these panels? Let's start in 1958.

A You know the question of whether they were white or colored didn't impress me one way or the other
[42] until the proposition started here about the Negroes weren't being treated fairly.

Q I did not mean to imply that at all.

A That's the first time that I paid any attention to whether they were white or black in the selection of them.

Q What I am trying to get to, though, is do you have a recollection of the maximum number of jurors which served on a panel from which the actual twelve were selected.

A Well, the panel was twenty-one.

Q Were Negroes on the panel of twenty-one?

A Yes, they were on those panels.

Q What is the most number of Negroes you ever saw on a panel of twenty-one?

A In my court, two or three.

Q Were there panels of twenty-one where there were no Negroes?

A Yes.

Q Were there more instances of no Negroes on the panel of twenty-one than there were of some Negroes on

the panel of twenty-one?

A I think so. Back early in my time on the court, there were very, very few Negroes, if any. I don't know. At that time, there wasn't any question raised about white or black or anything of the kind, and I don't remember.

Q Starting back in 1922, were there very few,

[43] if any?

A Yes. Few, if any.

Q And then in 1958, at about the time you retired, were there any then?

A Yes, it picked up after the question of Negroes being on the jury—I think the jury commission, you know they laid out new panels, new boxes, and I think they put them in more. We had a trial here in court, in Judge Gilbert's court, and I sat here with him, and the jury commission was called in. They wanted to see the jury box. They wanted to open it and look at it. Well, we wouldn't let them do that, because it's against the law for anybody to do that, but we told them they could summon in any of the jury commission to testify, and they summoned them and they testified that there were many Negroes in the box. A lot of these things you asked me before, I have been thinking about it all together, and that's exactly correct. I didn't know how many were on the panel myself. I asked Miss Alma and she said it was twenty-one. I thought it was twenty-four.

Q So on the panels of twenty-one as late as 1958, there were never more than three Negroes?

A That's just my recollection of it. There were more than that supposed to be on there that didn't come back. After they were put on the jury, they didn't come

[44] back, and we had to fill them out with other people.

Q And you say there were panels of twenty-one which were all white?

A Yes.

Q Did the panels of twenty-one which were all white outnumber the panels with Negroes?

A I think so.

Q Is it an accurate statement that eighty percent of the panels of twenty-one that were selected were all white?

A I don't know about this percentage proposition. I wouldn't say eighty or ninety or what, but of course the great majority were white. The jury commission was supposed to select them from different all sections of the county, and different districts according to the number of people that lived in them, and things of that kind, and of course that made it work out that way, because there were many districts of the county where there were few Negroes, if any, and so necessarily the jury box included more white than it did colored. I have been thinking about this thing since you talked to me about it, and I am trying to make it as positive as I can.

Q To the best of your recollection, what per-
[45] centage of these panels were all white? Eighty percent? Ninety? Seventy-five?

A Well, for a long time, as I told you, there were no Negroes.

Q I am talking about from 1945 to 1958, to be reasonably accurate.

A I wouldn't want to make a guess on the percentage of them. I had rather tell you the facts as I remember them. I wouldn't want to make guesses.

Q As a matter of fact, were the vast majority of the panels of twenty-one all white?

A Some of them were, yes. You see, we would try to select them from all over the county.

Q How often, Judge Hart, were the names in the jury boxes from which these lists were made changed?

A Well, there was no time for it, and that was fixed by statute for them to do it. We would have a box with the jurors in it that would last for many years, sometimes, and then another thing about that would be when the same ones were in there, and we had to exclude the same ones that had served in three years—I think it's two years after 1947, isn't it, Judge?

THE COURT: "It is still three."

Q Do you mean the names in the box were
[46] changed every three years, or were they not allowed to serve again under three years?

A They couldn't serve only one time in the three years. That meant that we would send a ticket to the jury commission of those that had been selected, and they were then supposed to put them in the box after three years.

Q How often were the names changed in the first box?

A Well——

Q The box in which all the names were listed.

A Well, some of them were put back anyway. We had to strike a lot of them that had been on, and the commission made a mistake in putting some of them back, but the law was that they were not to serve but once in three years, and when they would come in, we would ask them how long it had been since they had been on the jury and if they had served on a jury within three years, we would excuse them.

Q What I am trying to get at is how often new names were put in the jury box?

A If I remember correctly, there was no particular time for it. When the panel—when the jury box got down to where it was hard for the court to get a jury of jurors, then we, and Judge Lankford was chairman of the board of
judges, and we would have meetings and they would
[47] ask the jury commission to fill up the box. I don't

know how often that was.

THE COURT: "That's still the way it is done. You have stated it right. When the jury box gets so low that we can't get people who haven't served in the last three years, then we ask the jury commission to replenish the box. There used to be ten thousand, now it's twenty thousand."

Q What I want to know is how often the new names were put in.

A That depended on whether or not the lists were——

Q Was it twenty-five years, two or three years?

A It was several years, I think, before we changed. Just when the jury box got low and we would have a hard time getting jurors and we asked the jury commission to make us out a new one.

Q Was it more than two years?

A Oh, yes.

Q Was it more than five years?

A I guess sometimes.

Q I wondered if you had knowledge of it.

A I had knowledge of it at the time. When we needed it, we would ask the jury commission to get us another.

Q Was it more than four years?

[48] A I think it was, and during the meantime, a whole lot of them would be used.

Q Of the actual juries of twelve which tried cases, do you recall during your term of service whether there were Negroes on those juries?

A Yes, there were Negroes on the juries.

Q Do you remember the most you ever saw?

A No.

MR. BRANDT: "If Your Honor please, I object to this. We are getting into a matter of peremptory challenges which lawyers are free to use as they see fit, and I don't

see how it shows anything."

MR. WESTERMANN: "I understand there's a case before the Supreme Court, I think it has been disposed of, that has in issue the rights of peremptory challenge of Negro jurors on a discriminatory basis. This is state action which has resulted in discrimination, and I want to be prepared to raise that issue."

JUDGE HART: "Did I understand you to say that the question has been raised whether a man could challenge anybody he wanted to?"

MR. WESTERMANN: "I think, yes. I think so."

JUDGE HART: "Well, that never was raised
[49] when I was in the courthouse."

Q Do you recall that Negroes did serve?

A Oh, yes.

Q Do you recall that there were more than one on any particular jury of twelve?

A I didn't pay any particular attention to that. If they were on the panel, as they came in the lawyers took them, and that was all—I didn't notice. I don't remember, but a few, like I told you. For a long time the colored people would come in and get excused. They didn't want to serve. Then after the question of discrimination got to be a big thing, then the Negroes began to serve without asking to be off. Now, a lot of them, even after that, that had regular jobs, and at that time the jury paid just two dollars a day, and they wanted off and we let them off because they weren't able to stand being off.

Q What I am getting at, what was the percentage of all white juries? Can we get to that?

A There were a whole lot of all white juries.

Q Do you think the percentage of all white juries relative to the total juries was over eighty percent?

A I don't think it is proper for me to guess. I would

[50] just be making a guess, if I do that. I don't keep up with that. I didn't try.

Q Do you recall having more than two jurors on any jury of twelve?

A It seems to me that two or three would be all.

Q Can you recall what you observed in this regard back in 1947 and 1948?

A No.

Q Do you recall having Negroes on the petit juries back in 1947 or 1948?

A No. No. I don't know whether that was the time that Negroes began to serve or not. It may have been before that. There were Negroes in the jury box that were summoned to come in. Some of them wouldn't come, and some of them that did come didn't want to serve, and some that came in, they had a job, and just the two dollars a day was a hardship and they asked to be let off, because they had families and things of that kind, and I felt it was my duty to let blacks off if it was injurious to their making a living.

Q On the panel from which you selected the panel of twenty-one, were there as many as ten percent Negroes on it?

A Sometimes more than that. Two or three. At that time, I never thought of this kind of question being rasied, and I didn't keep up with it. There were not too many colored people serving, no. Not until

[51] recently were they willing to serve.

Q I think it is a correct statement that there were very few or practically no Negroes serving on the petit juries in 1922. Toward the end of your term of service in 1958, you found as many as three on these final panels of twenty-one.

A I will give you my recollection of it. For a numbe

of years, I don't remember when I first went on the bench that there were Negroes on the jury at all, summoned, or on the list or anything, way back there. The jury commission was in service at that time.

Q Was this a kind of a general progression up to the time when you left the court in 1958?

A I think from 1950 to 1958 it picked up a little. That's my recollection.

There being no further questions, the witness withdrew.

HARRY G. NICHOL was called by the petitioner, and his oath being waived, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Westermann:

Q Will you state your name, please, sir?

A Harry G. Nichol.

[52] Q What is your age, please, sir?

A Seventy last month. I just had a birthday.

Q Mr. Nichol, you served as Attorney General and Assistant Attorney General for Davidson County, Tennessee, for a number of years?

A Yes, sir.

Q Would you state your years of service, and in what capacity you served, particularly between 1940 and 1955.

A From 1940 to 1955, I was in the district attorney's office during that entire period. I have been in three times and out twice. The voting public sometimes don't see things right.

Q But you were in the district attorney's office from 1940 to 1955?

A Yes, sir.

Q During the year 1940 and up until 1948, were you involved in the activity of presenting cases to the grand

juries of Davidson County, Tennessee?

A Yes, sir.

Q Was anybody else in your office involved in that activity?

A Yes. I spent the greater part of my time in the grand jury division. I had had some courtroom experience. For eleven years I did not. I had an assistant who [53] worked in that division, and I had a secretary and a few officers.

Q Do you think that you observed every grand jury, personally observed members of the grand juries of Davidson County, from 1940 to 1955?

A I would say I had very close contact. Yes.

Q Do you think you saw every grand juror?

A Oh, yes.

Q Do you recall during that period of years when the first Negro served on a grand jury, between 1940 and 1955?

A I remember individually. The year, I cannot give. I remember the first one was a doctor, H. H. Walker, who happened to be also commander of the colored American Legion and a very outstanding citizen, and he served on the grand jury on two different occasions. Two different terms. That's the first one I remember, Dr. H. H. Walker.

Q Can you possibly give the year which, to the best of your recollection, is the first year he served?

A It was in the years you state. I would say early '50's. I will say this. I have been subpoenaed several times on a hearing like this, and somebody told me on one of the hearings in Division One it was '53. That might be right. It's about that.

[54] Q That's not inconsistent with your thinking?

A That's right. I have no independent recollection.

Q During your term of service as attorney general

and assistant attorney general in 1940 until 1955, did you try many cases before criminal court juries?

A In the thirties, I was the regular trial attorney, and for a period of years I was continuously in court. I don't believe that the years you gave, I was in court very much.

Q Between the years 1940 and 1948, did you have occasion to observe petit juries in criminal courts?

A Some.

Q Do you recall whether or not Negroes served on those petit juries between 1940 and 1948?

A I can't answer that for this reason. You give me years, and that's twenty years ago, and I'm not the best one in the world on time. I have seen them, but now frankly, you're talking about twenty years ago now. I have seen them many times, but I can't place the years, frankly. I do remember the grand jury, though. That was outstanding to me, and I knew them individually.

Q I would like to talk about the years from 1940 to 1950 as to petit juries. If you can't remember exactly the years they served or didn't serve, if you could [55] give me some kind of information as to the numbers of actual petit jurors who were Negroes.

A That's a matter of guess and speculation. We used to have in the clerk's office where they were listed, the name, and he would put a little "c" by it. I don't know whether those cards are still there or not. For the last several years they aren't making that identification. That's the best way I know to tell, that card system they had one time. Mr. C. H. Smith kept it, and I understand Mr. Hawkins kept it. I would have to refer to that if it's still in existence. They stopped about four years ago putting the identification.

Q You say about four years ago?

A It was about two years before I left office, and I've been gone over two years.

Q Do you think they kept all those cards?

A It was my understanding they kept them. I had no occasion to inquire, but I was interested in elections and I used to refer to them quite often, then when I was elected the last time and didn't have any intention to run, I didn't go to them.

Q But these were back in the clerk's office you say two years ago?

A Two years the first of September.

[56] Q Were many Negroes serving on grand juries then?

A I noticed in recent years they were increasing in numbers.

Q What is the highest number you ever saw, even in recent years, serving on the jury?

A I was here in the courtroom here one day, this is since I left, and I saw women and colored people constituting the majority of the jury, which was unusual odds and that just struck me when I walked in the courtroom. It was more than I had been used to.

Q Would you say there were more than——

A (Interposing) I would say ten percent was the maximum.

Q Ten percent was the maximum?

A I would say that. Yes.

Q And that includes up until two years ago?

A And I will say that's the maximum. Yes. That's just more or less speculation and guess.

Q What percentage of the juries you observed were all white?

A I have seen grand juries all white.

Q What percentage of the petit juries that you observed

over this span of years between 1940 and 1953 were all white?

A Well, most times, those in the box trying cases were white. What were in the room, and what got excused by the court, or anything like that, I can't answer that.

I would like to, but all the juries I would see was
[57] mostly in the box. I made it a rule to stay out of the jury room. I did that, and I gave my officers orders to do that, not go in the jury room.

CROSS-EXAMINATION

Questions by Mr. Brandt:

Q General Nichol, do you remember shortly after you left office you were retained to represent a man named Findley and one named Schiveley, who were charged with raping a Negro girl from Chicago when she got off the train down here?

A I was employed in that case for a while and got out of it.

Q If I am not mistaken, I think there were five Negroes on that jury of twelve.

A Yes, sir.

Q General Nichol, as a practical matter, though, the law says that the grand jury can take cognizance of crimes in Davidson County, as a practical matter, the vast majority of the cases that the grand jury hears are cases submitted by the district attorney's office?

A About ninety-five percent, I would say.

Q And most of those are cases in which somebody somewhere along the line swore out a warrant
[58] against another person?

A That's right.

Q Usually the party doing this is a police officer?

A In most cases.

Q And it is also true, is it not, General Nichol, that

under your administration in recent years, and I'm talking about personalities, and I am sure it was the same before—Mrs. Wehby came to your office in 1948?

A Yes. I was an assistant when she came there.

Q When did she get there? In 1948? 1947?

A I thought Miss Pauline told me she had been there sixteen or seventeen years some months back. Maybe it was twenty years ago.

Q And she has been grand jury? That has been her function, primarily?

A Yes.

Q She sets the schedule for the grand jury and determines which cases and what time they will go before the grand jury?

A She does now. I had a little different arrangement. I had a man who would do the subpoenaing work, and he would set the dates. I had one man whose job was to subpoena witnesses, and he would set the dates, mark them what day and hand them to Mrs. Wehby and the rest of the staff.

[59] Q I believe now Mrs. Wehby sets all the dates?

A She sets them now.

Q Before a case is submitted to the grand jury, a lot of times a person will have another person arrested. Sometimes a survivor will swear out a warrant, or sometimes a police officer may swear out a warrant?

A That's right.

Q And a warrant would then come to the district attorney's office?

A Yes, as soon as it was bound over, it was delivered by the clerk to the district attorney's office.

Q And then the case would be evaluated sometime along the line by some lawyer in the district attorney's office?

A Yes.

Q By General Bumpus, or yourself, or somebody in that office?

A Get statements from the witnesses first, and then submit it.

MR. WESTERMANN: "If Your Honor please, I would like to object to this on the ground that it has nothing to do with this case."

MR. BRANDT: "Well, I didn't object to all those irrelevant questions of Judge Hart, and I request the same privilege."

THE COURT: "Well, what I don't need to know, I will discard it."

Q General, at some time or other, some attorney in the district attorney's office will evaluate the case, and many times, if a man is charged with burglary, he might change it to larceny, because the one who swore out the warrant swore out the wrong thing?

A Oh, yes.

Q Many times you would dismiss a case when it came back there?

A That is correct. In fact, I guess I put too much time on that. I would screen at least ninety percent of the cases.

Q When did you become district attorney?

A In 1956. January 1, 1956.

Q You say you personally——

A The majority of them, I would do that. Unless I was sure they had the right evidence, I didn't want to embarrass my men in court if they had a bad case.

THE COURT: "The Court can hardly keep from making some statements itself. Let the record show it bit its tongue."

Q Many times, you or other members of your staff

would dismiss a case that you couldn't prove?

A I had a rule that whenever a case was dismissed
[61] either myself or Mr. Bumpus, I would require them to write a full statement of the case and the facts and file it away. The reasons for it was because you could produce it if anybody invited your attention to it. They had to put the reasons and the detailed facts of the basis of dismissal.

Q Of course, this frequently occurs?

A Oh, yes. Many warrants are issued, probably hastily, and some of the judges act in haste in night court, and sometimes special judges.

Q When did you start in the district attorney's office?

A Right after the legislature was over in 1927. The legislature was over in April, and I was appointed the first of May. I was a member of that legislature.

Q And you have been in the district attorney's office, off and on, since then, until——

A (Interposing) Off and on, yes, sir, but there have been some interruptions there.

Q Do you ever recall submitting a case to the grand jury as assistant district attorney—I believe you said in the thirties you were doing grand jury work?

A In the forties.

Q So the time this man was indicted, you were
[62] doing grand jury work?

A Yes, sir.

Q Do you ever recall in your time there submitting a case to the grand jury in which you discriminated against Negroes, or any member of any race?

A I am not conscious of it. In things that have developed in recent years, I have had a lot of trouble locally, and people have said that I was biased, but I wasn't conscious of it. In recent years I have been told I was by a few in

some of these riots and things.

Q Well, let's not talk about riots and things. I am talking about a criminal case.

A I am not conscious of being biased.

Q Did you ever witness, yourself, or any other member of your staff, ever submitting a case to the grand jury or not submitting a case to the grand jury for race reasons?

A No, I did not.

Q If that had gone on during your tenure of office, would you have tolerated it?

A I would not have.

Q Have you ever known of any grand jury which has or has not acted upon a case, or refused to act upon a case because either the victim was a white person or a Negro, or the defendant was a white person or a Negro?

[63] A The grand jury acts in secrecy, but nothing has been brought to my attention like that.

At this time, the witness was dismissed and withdrew.

MR. WESTERMANN: "If Your Honor please, I would like to introduce into evidence this certified copy of the minutes from the criminal court clerk's office of the service of Dr. H. H. Walker. This indicates Dr. Walker was appointed on April 16, 1953."

THE COURT: "Let it be marked filed."

MR. WESTERMANN: "I would further like to introduce to the court a statement by the criminal court clerk that he has searched the minute books—this is a statement by Mr. Earl Hawkins as follows: 'This is to state that the minute book record of grand jurors has been searched in the criminal court clerk's office from 1943 until 1953 and no other service of H. H. Walker is found.'"

THE COURT: "Let it be marked filed."

MR. WESTERMANN: "Your Honor, concerning the fact that Mr. Nichol thinks these cards and the race of

[64] these petit jurors were listed and is still available—
I have no knowledge of that. Somehow, I thought that this information was not available."

THE COURT: "I think you will find that it is not. If you want to make an effort to get it, we will take a few minutes and let you do it."

At this time, 3:40 P.M., until 3:50 P.M., the court was in recess.'

MR. WESTERMANN: "I have no other proof."

THE COURT: "Does the state have further proof?"

MR. BRANDT: "No, Your Honor, except the court can take judicial notice of all law relative to how the jury is selected in Davidson County, both grand and petit juries."

THE COURT: "Yes, we have gone into that very much in detail in other cases that are on appeal now, touching this question. Do you want to argue this case, or do you want to call my attention to anything by way of a brief? What is your pleasure, Mr. Westermann."

MR. WESTERMANN: "Your Honor, I would like the opportunity to submit a brief on this, both relative to what we have established and what the law is that I think relates to it."

[65] THE COURT: "All right. Furnish General Brandt a copy of it."

THIS WAS ALL THE EVIDENCE ADDUCED IN THIS CASE.

At this time, 4:00 P.M., the above matter being under advisement, the court adjourned.

The Petitioner tenders this Bill of Exceptions to the ruling of The Court on his Petition for Writ of Habeas Corpus.

State Criminal Court, Proceedings

February 7th, 1969

/s/ John L. Draper
Judge

/s/ W. Westermann,
Attorney for the Petitioner

/s/ Robert Brandt
Attorney for the State

FILED: Feb. 7, 1969
Earl Hawkins, Clerk.
By: J. Shea, D. C.

3. EXHIBITS TO THE BILL OF EXCEPTIONS

[Unnumbered Exhibits: Minute Entries for Criminal Court of Davidson County, January 5, 1948 (Grand and Petit Jury venire) and February 13, 1948 (Indictment of Henderson)]

MINUTES January TERM, 5 DAY OF January 1948

Monday, January 5th, 1948

Davidson County Criminal Court
Division Two.

State of Tennessee.

Pleas at the Court House, in the city of Nashville, County of Davidson, State of Tennessee it being the first Monday in January and the fifth day thereof, 1948, of the one-hundredth seventy-second year of American Independence present and presiding the Honorable Charles Gilbert, Judge etc., of the Criminal Court of Davidson County Tennessee Division Two, when the following proceedings were had towit:

The Criminal Court, Division Two was duly opened by J. W. Charlton, Deputy Sheriff of Davidson County, Tennessee

Garner Robinson, Sheriff of Davidson County Tennessee returned into the state writ of venire facias which is in the following words and figures to wit:

December 15, 1947

To the Sheriff of Davidson County, Tennessee, greetings:

State Criminal Court, Unnumbered Exhibits,
Minute Entry for 1-5-48

You are hereby commanded to summons the following jurors, drawn and selected according to law, from which to select the Grand and Petit jurors for the ensuing January Term 1948, to appear before the Honorable Charles Gilbert, Judge etc., Division Two of the Criminal Court of Davidson County, Tennessee, Division Two, Monday morning, January 5th, 1948 at nine thirty o'clock, a.m. at the Criminal Court in Nashville, Tennessee.

1.	James A. Gleaves, Sr.	Overhill Drive 111 W and 33 Donelson
2.	Morris Zager	Fourth Avenue North
3.	Dave Caldwell	Court House
4.	Charles A. Bowen	1206 8th Avenue South
5.	Bratten Evans	Tenn. Enamel Co. 8-8971 Ellendale
6.	L. C. Sanders	Post Office
7.	A. S. McCord, Sr.	217 Rayon Drive- Old Hickory 4th Dist.
8.	E. A. Wright	1406 Eastland Avenue
9.	Thomas A. Williams	Hill Road 6th District
10.	Will C. Murray	2308 Brick Church Pike
11.	John Wilson Frazier	928 Broad Street or Caldwell Lane
12.	Will Core	114H District
13.	Ed Potter	Commerce Union Bank
20.-14.	John T. Hester	4th District 1605 Elliston O.H
21.-15.	Pierce W. Crawford	4th District 1014 Elliston O.H
22.-16.	Geo. Bradley	4th Dist. 1108 Dodson O.H.
23.-17.	Murry Sharp	Hermitage R. #1
24.-18.	K. W. Brown	102 Orchard Rd.
25.-19.	Geo. W. Russell	409 Hadley
26.-20.	Ralph Rives	Pitts
27.-21.	J. H. Bright	Mt. Juliet R 3.

28.-22.	Thos. M. Gatlan	713 Elliston O.H.
29.-23.	Donnie O. Cook	Pitts O.H.
30.-24.	W. R. Binkley	807 Hadley
31.-25.	O. N. McClung	Rt. #1 Old Hickory 4th Dist.
54.-26.	Everett M. Clayton	Ellendale Ave. 7th Dist.
55.-27.	John F. Eubanks	4212 Kirkland Ave
56.-28.	Roy Brown	186 Kenner Avenue
57.-29.	Joseph H. Bandy	Woodmont Blvd.
58.-30.	W. W. Morehead	Walnut Drive
59.-31.	E. H. Dickman	3095 Kimberlong Rd.
60.-32.	John Dillow	1492 Woodmont Blvd.
61.-33.	T. M. Harris	3612 Saratoga Dr.
62.-34.	S. W. Berger, Jr.	1904 Woodmont
63.-35.	J. M. Ewing	Bellemead Blvd.
64.-36.	E. T. Proctor	Westview Avenue
65.-37.	James Bolton McBryde	Lynwood Terrace
66.-38.	H. G. Huddleston	Clarendon Avenue
67.-39.	Norman M. Hughes	Tyne Blvd.
68.-40.	Maxey Hewitt	2600 Hillsboro Rd.
69.-41.	Harold G. Lowe	4204 Estes
70.-42.	Emery P. Framback	Ensworth Avenue
71.-43.	Robert L. Fox	119 Woodmont Blvd.
72.-44.	N. T. Kinzl	Leake Avenue
73.-45.	Sam M. Porter	210 Walnut Drive
74.-46.	J. O. Foxall	3714 Ashburn
75.-47.	J. Harold Foxall	Page Road
76.-48.	Frank W. Hager	Signal Hill Drive
77.-49.	Max Friedman	Tyne Road
78.-50.	M. B. Frost	Westover Drive
79.-51.	Geo. Gaffney	2808 28th Ave. So.
80.-52.	Tom Fuqua	Hampton Avenue
81.-53.	Geo. R. Gage	Hampton Avenue
82.-54.	A. F. Anderson	1885 Bellemeade Blvd.

83.-55.	John N. Brown	Lynwood Blvd.
84.-56.	Monroe Brown	Harding Rd.
85.-57.	Mark C. Brown	105 Woodmont
87.-58.	J. R. Buchanan	Marlin Avenue 7th Dist.
88.-59.	Raymond S. Brooks	Valley Vista Road 7th Dist.
89.-60.	Wm. M. Lellyett	3505 Ruland Place 7th Dist.
90.-61.	Maurice Lodenthal	3507 Woodmont Lane 7th Dis
91.-62.	W. P. Smith	Howell Place 7th Dist.

Thereupon from the jury list heretofore drawn and summoned the Court appointed James A. Gleaves, Morris Zager, D. P. Caldwell, Charles A. Bowen, Bratton Evans, L. C. Sanders, A. S. McCord, Sr., E. A. Wright, Thomas A. Williams, Will C. Murray, John Wilson Frazier, Will Core, and Edward Potter as Grand Jurors for the ensuing January Term 1948.

Thereupon the Court was pleased to appoint Edward Potter Forman of said Grand Jury and said Grand Jury being duly elected, impaneled and sworn according to law were this day charged by the Honorable Charles Gilbert, Judge etc., of Division Two of the Davidson County Criminal Court and retired to consider indictments and presentments.

Thereupon the following Petit Jurors were selected by the Court to serve in Division 2 for the first three weeks of the ensuing January Term 1948 being from January 5th, 1948 to January 26th, 1948 to wit:

John T. Hester	John W. Thomas
Ralph Rives	G. L. Nix
Frank Hager	A. M. Spinning, Jr.
H. M. Courtney	K, W. Brown
Carl W. Dunneback	N. T. Kinsley
Noah J. Nesbitt	William Lellyett
Pierce W. Crawford	H. E. Newland
Robert L. Fox	Paul E. Clay
Max Friedman	Harold J. Ashley

Thereupon the following Petit Jurors were selected by the Court to serve in Division 2 for the second three weeks of the ensuing January Term 1948 being from January 26th, 1948 to February 16th, 1948 to wit:

Maxey Hewitt
Donnie O. Cook
James E. Kersley
O. M. Greenway
James B. Hodges
Ernest Blythe
J. A. Senter
C. A. Conquest
O. D. Manier
Alvin Lashlee
Richard L. Justice
Ivey Young
Thomas M. Gatlin
William P. King
Basil L. Johnson
A. C. Slaton
C. E. Denny

Thereupon the following Petit Jurors were selected by the Court to serve in Division 2 for the third three weeks of the ensuing January Term 1948 being from February 16th, 1948 to March 8th, 1948 to wit:

E. H. Dickson
J. F. Kennedy
C. M. Locke
W. A. Myers
William P. Ballinger
W. R. Binkley

Thereupon the following Petit Jurors were selected by the Court to serve in Division 2 for the fourth three weeks of the ensuing January Term 1948 being from March 8th, 1948 to March 29th, 1948 to wit:

E. M. Cox

Bob Briley, L. S. Castleman Jr. and Dewey Norman, Deputy Sheriffs of Davidson County, Tennessee were this day appointed by the Court to wait upon the Court during the ensuing January Term 1948.

State Criminal Court, Unnumbered Exhibits,
Minute Entry for 2-13-48

Charles Smith, Fred Toney and W. Y. Draper, Deputy Sheriffs of Davidson County, Tennessee were this day appointed by the Sheriff as Court officers to wait upon the Court during the ensuing January Term 1948.

Thereupon it appearing to the Court that the jury is incomplete the Court will issue an alias venire facias at his convenience.

State of Tennessee
County of Davidson

, I, Virginia F. Fryer , Deputy Criminal Court Clerk of Davidson County, State of Tennessee, hereby certify that the foregoing is a true and perfect copy of the Selecting of Jury For January Term, 1948, as the same appears of record on Minute Book #40, page 86-89, at office in Nashville, Tennessee.

Witness my hand and official seal of court this 11th day of December , 1968. Ordered that Court stand adjourned until tomorrow morning at 9:30 o'clock.

/s/ Virginia F. Fryer,
Deputy Criminal Court Clerk,
Davidson County, Tennessee

/s/ Charles Gilbert, Judge.

MINUTES January TERM, 13 DAY OF February 1948

Friday, February 13th, 1948

Court met pursuant to adjournment, present and presiding the Hon. Charles Gilbert, Judge etc., Division 2 of the Criminal Court of Davidson County, Tennessee, when the following proceedings were had, to wit:

XXXXXXX
XXXXXXX

A. 132

State Criminal Court, Unnumbered Exhibits
Minute Entry for 2-13-48

One Against: John Thomas Shaw, Jr. — Murder
Willie Lee Henderson and
Robert James Dodson

State of Tennessee, Davidson County
January Term of the Criminal Court, 1948

The Grand Jurors for the State of Tennessee, duly elected, impaneled, sworn and charged to inquire for the body of the County of Davidson, and State aforesaid, upon their oath aforesaid, present: that John Thomas Shaw, Jr., Robert James Dodson and Willie Lee Henderson, Col., of said county yeoman, heretofore, towit; on the 22nd day of January 1948, with force and arms, in the county aforesaid, unlawfully, feloniously, willfully, deliberately, premeditatedly and maliciously did make an assault upon the body of one William H. Cotter, inflicting grevious and mortal wounds and injuries, from which said grevious and mortal wounds and injuries the said William H. Cotter did linger, languish and die on February 12, 1948, and him the said William H. Cotter the said John Thomas Shaw, Jr., Robert James Dodson, and Willie Lee Henderson, Col., then and there did unlawfully, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought kill and murder, against the peace and dignity of the State.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that the said John Thomas Shaw, Jr., Robert James Dodson, and Willie Lee Henderson, Col., heretofore to wit, on the 22nd day of January 1948, unlawfully, feloniously and violently did make an assault and battery upon the body of one, William H. Cotter, with the unlawful and feloniously intent then and there him, the said William H. Cotter, to rob, and to unlawfully, feloniously and violently steal, take and carry away from the person and from the

immediate presence of the [illegible] William H. Cotter the moneys goods and chattels to be found upon the person and in the immediate presence of the said William H. Cotter;

and while in the perpetration of said robbery the said John Thomas Shaw, Jr., Robert James Dodson and Willie Lee Henderson (Col) did unlawfully, feloniously, violently, wilfully, intentionally, maliciously, premeditatedly did make an assault and battery upon the body of the said William H. Cotter, with a certain pistol, inflicting grevious and mortal wounds and injuries upon the body of the said William H. Cotter, said injuries being inflicted with the intent to kill the said William H. Cotter, and upon him to commit the crime and felony of murder in the first degree from which said grevious and mortal wounds and injuries the said William H. Cotter did linger, languish and die on the 12th day of February, 1948:

Wherefore, the Grand Jurors aforesaid, upon their oath aforesaid, do present and say that the said John Thomas Shaw, Jr., Robert James Dodson, and Willie Lee Henderson, Col., of said County, heretofore to wit, on the 22nd day of January 1948, with force and arms, in the manner aforesaid, and by the means aforesaid, unlawfully, feloniously, wilfully, deliberately, premeditatedly and maliciously did kill and slay the said William H. Cotter, and did do and commit the crime and felony of murder in the first degree upon the person of the said William H. Cotter, in violation of Section 10768 of the Code of Tennessee, against the peace and dignity of the State of Tennessee.

J. Carlton Loser, Attorney General.

Endorsed: State of Tennessee vs. John Thomas Shaw, Jr., Willie Lee Henderson and Robert James Dodson.
Murder

A. 134

State Criminal Court, Unnumbered Exhibits
Minute Entry for 2-13-48

Mrs. H. L. Argo, Prosecutor.

Summon witnesses for the State: Mrs. H. L. Argo, 207 8th Ave. So. 6-9136; Gene Hooper 307 1/2 8th Ave. So. Fannie De Moss, 424 5th Ave. No. Wks. Squirrel Lodge, Joe C. Hill 119 Joyner Ave., Wks. Soldier's Club, Cedar St., Charlie Layne, 718 Jo Johnson, Wks Clements Paper Co. Harry W. Tyler, 720 27th Ave. No. Wks Soldier's Club, James Murray and Rex White, P. Cole and Richardson, Dr. Lester, St. Thomas Hospital, Luther, Balthrop and Burgess, P. Turner and West, P.

Witnesses sworn in open court and sent before the Grand Jury to testify in the above cause this 12th day of February 1948.

Edward Potter Jr., Foreman
J. Carlton Loser, Attorney General.

A True Bill: Edward Potter Jr., Foreman

Ordered that court stand adjourned until tomorrow morning at 9:30 o'clock.

/s/ Charles Gilbert, Judge

[Exhibit 1: Minute entry, Criminal Court of Davidson County, March 12, 1948 (Guilty plea of Henderson)]

MINUTES January TERM, 12 DAY OF March, 1948

Friday, March 12th., 1948

Court met pursuant to adjournment present and presiding the Hon. Chester K. Hart Judge etc., of Division One of the Criminal Court of Davidson County when the following proceedings were had to wit:

16399	State of Tennessee	C. W. Assault Intent
16401	vs	
Reset	Paul Vernon Richardson	

Came the Attorney General who prosecutes for the State and the defendant in person thereupon on motion of the defendant this case is reset for March 19th.

16323	State of Tennessee	Murder
P. G.	vs	
1st	John Thomas Shaw, Jr.	
Degree	Willie Lee Henderson	
99 yrs.	Robert James Dobson	

Came the Attorney General who prosecutes for the State and the defendants in person who being arraigned upon said indictment plead guilty to murder in the first degree and for their trial put themselves upon the Country and the Attorney General doth the like.

Thereupon to well and truly assess the defendants punishment there came a jury of good and lawful men of Davidson

State Criminal Court, Exhibit No. 1, Minute Entry for 3-12-48

County to wit: J. B. Dozier, R. A. Perryman, W. T. Walker, Jim Henderson, O. S. Lashlee, N. M. Hughes, Porter Frey, J. C. Evans, John Brummitt, R. H. Underwood, A. J. Lawson, E. J. Glasgow, who being duly elected, impaneled, tried and sworn to well and truly assess the defendants punishment and a true verdict render according to the law and evidence aforesaid, upon their oath aforesaid; upon their oath aforesaid; do say: That they find the defendants guilty of murder in the first degree and assess their punishment at confinement in the State Penitentiary for a period of nintynine years.

Thereupon the jury was discharged.

It is therefore considered by the Court that the defendants for their said offense shall be confined in the State Penitentiary for a period of nintynine years commencing on the date of their delivery to the keeper thereof subject to the rules and regulations of said institution.

That they pay the cost of this prosecution for which let execution issue.

16321 State of Tennessee C. W.
Nolle vs
Willie Lee Henderson

Came the Attorney General who prosecutes for the State and the defendant in person thereupon the Attorney General with the assent of the Court entered a straight nolle herein.

Ordered that court stand adjourned until tomorrow morning at nine-thirty o'clock.

/s/ Chester K. Hart, Judge

State Criminal Court, Exhibit No. 1, Minute Entry for 3-12-48

State of Tennessee
County of Davidson

I, Robert N. Bogus , Deputy Criminal Court Clerk of Davidson County, State of Tennessee, hereby certify that the foregoing is a true and perfect copy of the Minute Book Entry , in the case of State of Tennessee vs. Willie Lee Henderson , on a charge of Murder as the same appears of record on Div. 1-61 Book, page 629 , at office in Nashville, Tennessee.

Witness my hand and official seal of court this 21 day of October ., 19 68.

/s/ Robert N. Bogus,
Deputy Criminal Court Clerk,
Davidson County, Tennessee

[Exhibit 3: Affidavit of Director of Bureau of the Census, dated September 9, 1968]

U. S. DEPARTMENT OF COMMERCE
Bureau of the Census
Washington

September 9, 1968

I HEREBY CERTIFY, That according to the official count of the returns of the SIXTEENTH AND SEVENTEENTH CENSUSES OF THE UNITED STATES, on file in the Bureau of the Census, the total population and the population 21 years old and over, by color, for the County of Davidson, State of Tennessee, was as shown below, as of April 1, 1940 and 1950, respectively:

	Total Population		Population 21 Years Old and Over	
	1940	1950	1940	1950
Total Population	257,267	321,758	168,337	211,930
White	200,454	257,289	129,868	168,706
Nonwhite	56,813	64,469	38,469	43,224

/s/ A. Ross Eckler
A. Ross Eckler
Director
Bureau of the Census

[Exhibit 4: Minute entry, Criminal Court of Davidson County, May 4, 1953 (Grand Jurors)]

MINUTES May TERM 4 DAY OF March, 1953

Monday, May 4th, 1953

Davidson County Criminal Court
Division Two

Pleas at the Court House in the city of Nashville, County of Davidson, State of Tennessee it being the first Monday in May the fourth day thereof 1953, of the One Hundredth Seventy-Seventh year of American Independence present and presiding the Hon. Charles Gilbert, Judge etc., of the Criminal Court of Davidson County, Tennessee, Division Two, when the following proceedings were had to wit:

The Criminal Court, Division Two was duly opened by L. S. Castleman, Deputy Sheriff of Davidson County, Tennessee.

Tom Y. Cartwright, Sheriff of Davidson County, Tennessee returned into the State writ of venire facias which is in the following words and figures to wit:

State of Tennessee
County of Davidson

"To the Clerk: Subpoena all of the written named persons for jury service. Charles Gilbert, Judge 4/16/53

To the Sheriff of Davidson County, greetings:

You are commanded to summons the following jurors for the Criminal Court of Davidson County, Tennessee,

Division Two, at its May Term, 1953, to appear May 4th, 1953 at the Court House in Nashville, Tennessee.

(Filed March 12, 1969)

Of the above jurors summoned the Court appointed the following as Grand Jurors for the May Term 1953 to wit:

Milton Jones	C. F. Brew
Kelly Hill	Gill Reece
Charles Burke	E. M. Buchanan
Milton Randolph	Sol Hyman
H. C. Holderfield, Sr.	Dr. H. H. Walker
W. T. Brown	Tom Delbridge
Thomas J. Carroll, Sr.	

Said Grand Jury being duly elected and impaneled according to law of whom the Court was pleased to appoint Tom Delbridge as Foreman of said Grand Jury. Thereupon the Judge proceeded to charge said Grand Jury and after receiving the charge of the Court the Grand Jury retired to their room to consider of indictments and presentments.

Ordered that Court stand adjourned until tomorrow morning at nine-thirty o'clock.

/s/ Charles Gilbert, Judge

State Criminal Court, Exhibit No. 4, Minute Entry for 5-4-53

State of Tennessee
County of Davidson

I, Robert N. Bogus , Deputy Criminal Court Clerk of Davidson County, State of Tennessee, hereby certify that the foregoing is a true and perfect copy of the Minute Entry , in the case of State of Tennessee vs. Grand Jurors , on a charge of
as the same appears of record on Div. 11-46 Book, Page 430 , at office in Nashville, Tennessee.

Witness my hand and official seal of Court this 21 day of October , 19 68.

/s/ Robert N. Bogus,
Deputy Criminal Court Clerk,
Davidson County, Tennessee

[Exhibit 5: "Letter to Whom it May Concern," dated October 22, 1968]

DAVIDSON COUNTY

Earl Hawkins, Clerk
Criminal Court
Tenth Judicial Circuit

Nashville 3, Tennessee

October 22nd, 1968

TO WHOM IT MAY CONCERN:

THIS IS TO STATE THAT MINUTE BOOK RECORDS OF GRAND JURORS HAVE BEEN SEARCHED IN THE CRIMINAL COURT CLERK'S OFFICE FROM 1943 TO 1953 AND NO OTHER SERVICE OF H. H. WALKER IS FOUND.

THIS THE 22ND. DAY OF OCTOBER, 1968.

/s/ Earl Hawkins
EARL HAWKINS
CRIMINAL COURT CLERK

(Filed March 12, 1969)

COURT OF CRIMINAL APPEALS OF TENNESSEE

[459 S.W.2d 176]

STATE of Tennessee ex rel. Willie Lee HENDERSON, Petitioner,

v.

Lake F. RUSSELL, Warden, Respondent.

July 6, 1970

Certiorari Denied by Tennessee Supreme Court

Sept. 8, 1970.

OPINION

WALKER, Presiding Judge.

The petitioner below, Willie Lee Henderson, appeals from the dismissal of his petition for habeas corpus after an evidentiary hearing.

The petitioner, a Negro, has previously filed petitions in state and federal courts but he says that this is the first one raising the question that there had been systematic exclusion of his race from the grand jury which indicted him and the petit jury which convicted him.

In 1948 the petitioner, represented by retained counsel, entered a plea of guilty to murder in the first degree and was sentenced to 99 years in the penitentiary. He did not question the composition of the juries in the trial court,

either by motion or plea in abatement. He raises it now for the first time in this proceeding.

The petitioner was not convicted by a jury. He entered a plea of guilty voluntarily and with full understanding of its consequences. His plea of guilty was itself a conviction. Like the verdict of a jury, it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Brooks v. State, 187 Tenn. 67, 213 S.W.2d 7.

After a voluntary plea of guilty, the right to have evidence presented to a jury to fix the punishment is a statutory one and does not rise to constitutional stature. State ex rel. Edmondson v. Henderson, 220 Tenn. 605, 421 S.W.2d 635; State ex rel. Barnes v. Henderson, 220 Tenn. 719, 423 S.W.2d 497. Likewise, the composition of a jury fixing the punishment on a plea of guilty raises no constitutional question.

Since the composition of the petit jury on a plea of guilty raises no constitutional question, the real issue is whether or not the defendant waived the right to challenge the grand jury which indicted him.

In State ex rel. Barnes v. Henderson, supra, the court said:

"On the subject of waiver it has been noted that:

'As a general rule, subject to certain exceptions, any constitutional or statutory right may be waived if such waiver is not against public policy. In fact, the trend of modern authority is in favor of the doctrine that a party in a criminal case may waive irregularities and rights, whether constitutional or statutory, very much the same as in a civil case. Some jurisdictions, however, regard certain rights

as nonwaivable in capital cases, or even in felony cases generally. * *

'Where a constitutional right accorded the accused is treated as waivable, it may be waived by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it.' 21 Am.Jur.2d Criminal Law, § 219."

Under the criminal procedure in this state, objection to the venire or the indictment is deemed waived unless raised in apt time by motion or plea in abatement.

In State ex rel. Lawrence v. Henderson, Tenn.Cr.App., 433 S.W.2d 96, 101, this court said:

"If the defendant does not object by motion or plea in abatement, to the venire or to the jurors summoned under it, before he pleads to the indictment, an objection thereafter is too late."

See also Parker v. State, 2 N.C.App. 27, 162 S.E.2d 526 (1969), and Hamilton v. State of Alabama, 283 Ala. 660, 220 So.2d 267 (1969). In those cases, the Court of Appeals of North Carolina and the Supreme Court of Alabama held too late a claim in postconviction proceedings that members of petitioner's race had been systematically excluded from the juries when no such question was presented at his trial.

The petitioner here participated as an actor in the order which he now seeks to set aside. After due and thoughtful consideration and after being properly advised by his retained counsel, he entered a plea of guilty to murder in the first degree and took the known sentence of 99 years rather than take the calculated risk of receiving a more severe penalty at the hands of a jury. See Ray v. State, Tenn., 451 S.W.2d 854 (1970).

We hold that petitioner, acting through his employed attorney, waived any objection to the composition of the grand jury or the petit jury, by his failure to proceed in apt time to question them in the trial court.

Federal courts hold that objection to the racial composition of a grand jury must be raised before trial and may not be presented for the first time on a motion to vacate or by writ of error coram nobis. This rule offends no constitutional right.

In Bustillo v. United States, 421 F.2d 131, 132, (5th Cir.), the petitioner filed a 28 U.S.C.A. Sec. 2255 motion to vacate his sentence, claiming that the grand jury which indicted him was defectively constituted. Two years before this proceeding, he had entered a plea of guilty to bank robbery. Affirming denial of the motion without a hearing, the court said:

"Objections to the composition of a grand jury are governed by Rule 12(b) (2) of the Federal Rules of Criminal Procedure. Shotwell Manufacturing Company v. United States, 1963, 371 U.S. 341, 83 S. Ct. 448, 9 L. Ed. 2d 357. Rule 12(b) (2) provides that a defect in the indictment must be objected to by motion before trial and that failure to object at that time waives such a defense. Bustillo did not object before trial, or at any other time during the proceeding on the merits, to the composition of the grand jury which indicted him. His failure to do so constituted a waiver so that he may not now for the first time assert such an objection. Scales v. United States, 1961, 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782; Jackson v. United States, 5 Cir. 1968, 394 F.2d 114, 115; Perez v. United States, 5 Cir. 1962, 303 F.2d 441."

In Jackson v. United States, 394 F.2d 114, the Court of Appeals (5th Cir., 1968) considered an objection to the racial composition of the grand jury presented by writ of error coram nobis. It held:

"He is likewise barred from raising the question of the composition of the grand jury on the allegation of racial exclusion, being required by Rule 12(b) (2) of the Federal Rules of Criminal Procedure to allege such a defect by motion before trial, which he did not do then or at any other time during the proceeding on the merits. His failure to do so constitutes a waiver thereof so that he may not now, for the first time, more than two years after his trial, question the composition of the grand jury which indicted him, the Trial Judge having correctly held that he was in no way prejudiced."

In Atlas Roofing Manufacturing Company v. Parnell, 409 F.2d 1191 (5th Cir., 1969), the court said:

"In the absence of actual bias or prejudice, an objection to the composition of the grand or petit jury panel comes too late after the verdict."

By a state prisoner's habeas corpus proceeding in Hayes v. Wainwright, D.C., 302 F. Supp. 716 (1969), the petitioner claimed that Negroes were systematically excluded from serving on grand juries. Finding no merit in his contentions, the court said:

"In any event, petitioner having failed to raise an attack upon the grand jury's composition at the time of his trial cannot now raise the issue."

In Doyle v. State, Tenn.Cr.App., 458 S.W.2d 637 (cert. denied April 20, 1970), by post-conviction proceedings, the petitioner objected to the racial composition of the grand

and petit juries which indicted and tried him. Speaking for the court, Judge Russell held:

"We hold, however, that his right to raise this question was waived when it was not waived upon the trial by motion or plea in abatement prior to his pleading to the indictment. Discrimination in the composition of venires has long been condemned in Tennessee. See Zanone v. State, 97 Tenn. 101, 36 S.W. 711. It has also been held in Tennessee, in a long line of cases, that unless a defendant objects by motion or plea in abatement to the venire before he pleads to the indictment he cannot thereafter avail himself of a claim that the venire was improperly composed. State v. Cole, 28 Tenn. 626; McTigue v. State, 63 Tenn. 313; Turner v. State, 89 Tenn. 547, 15 S.W. 838; Ellis v. State, 92 Tenn. 85, 20 S.W. 500. See also State ex rel. Lawrence v. Henderson, Tenn.Cr.App., 433 S.W.2d 96. We do not believe that one should be permitted to raise a question in a post conviction proceeding that was waived by failure upon the trial, by design or otherwise, to timely raise it when our procedural law prescribes that it should be raised. To permit this type procedure would make a sham of the trial itself. A defendant would not raise such questions upon the trial in the hope that he would be acquitted, but with the assurance that he could avail himself of the complaint post conviction to obtain a new trial. We hold that this question was disposed of upon the trial adversely to Doyle when it was not then raised. We are not dealing with a constitutional principle newly announced since his trial, but a right well recognized and protected at that time."

We held to the same effect in Burt v. State, Tenn.Cr. App., 454 S.W.2d 182 (cert. denied May 4, 1970).

From these authorities, it results that the judgment of the lower court dismissing the petition is affirmed.

GALBREATH, Judge (concurring).

I concur completely with Judge Walker's opinion. The law that failure to make an objection to the racial composition of a Grand Jury is waived unless raised by an appropriate pretrial motion is too well settled for this Court to disturb. I recognize the irrationality of the law as it applies to ancient cases of this type. No lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948, just as scarcely anyone objected to the complete segregation of all public and private facilities of any kind in the State until the next decade. But the law is as set forth in Judge Walker's opinion; and it must be changed, if ever it is (and I personally believe it will be soon or late), by an authority higher than this Court.

OLIVER, Judge (dissenting).

I am unable to concur in the result reached by the majority. Some further discussion of this case is appropriate.

This is the same petitioner involved in the case of Willie Lee Henderson v. C Murray Henderson, Warden, in which the Supreme Court of this State reversed the same trial court and remanded the case for an evidentiary hearing in an unpublished opinion filed November 3, 1967. In that opinion, the Court said:

"This is the second petition for the writ of habeas corpus filed by petitioner to reach this Court. The only allegation contained in the present petition, other than

those disposed of by a unanimous opinion released on September 9, 1966, is a dogmatic statement there was a systematic exclusion of Negroes from serving on the grand and petit juries in Davidson County at the time of the indictment and petitioner's trial.

"The trial judge summarily dismissed the petition without a hearing.

"Petitioner has perfected an appeal to this Court and assigned as error the failure of the trial judge to hold an evidentiary hearing on the allegation of systematic exclusion of members of petitioner's race from the grand and petit juries in Davidson County.

"Respondent insists by his plea of not guilty the petitioner waived his right to question the legality of the grand jury which indicted him and the petit jury which convicted him.

"A systematic exclusion of Negroes from jury service is a denial of due process of law as required by the Fourteenth Amendment to the Constitution of the United States. Eubanks vs. State of Louisiana, 356 U.S. 584, 78 S. Ct. 970, 2 L. Ed. (2d) 991 (1958).

> 'Where Negroes are systematically excluded from both grand jury which indicted a colored petitioner, and from the petit jury which convicted him, the judgment is unconstitutional and void.' Harris vs. State of North Carolina [D.C.], 240 F.Supp. 985 (1965); United States, ex rel. Goldsby vs. Harpole [5 Cir.,] 263 F.(2d) 71 (1959).

* * *

"Evidence that none, or very few Negroes have served as jurors over an extended period of time will establish

a prima facie case. United States, ex rel. Goldsby vs. Harpole, supra; United States, ex rel. Seals vs. Winan, 304 F.(2d) 53 (1962); Arnold vs. North Carolina, 376 U.S. 773, 84 S. Ct. 1032, 12 L. Ed. (2d) 77 (1964).

> 'While a full evidentiary hearing may not be warranted or proper for every petition for habeas corpus in this State, nevertheless, a petition alleging sufficient facts to establish that petitioner's conviction was void because of alleged denial of constitutional rights, federal or state, necessitates a trial of those facts under the aforesaid Act. The attack on a criminal judgment on the ground that it is void because of lack of constitutional due process deserves particular scrutiny.' State [ex rel. Reed] vs. Heer, —Tenn., —, 403 S.W.(2d) 310 (1966).

"From the above principles, we think it was error for the trial judge to have summarily dismissed the petition. We think he should have appointed an Attorney to represent petitioner with leave to amend the petition to allege such facts, if possible, which, if proven, would support the allegation that members of his race were systematically and deliberately excluded from the grand jury which indicted him and the petit jury which convicted him.

"The question of whether petitioner waived his right to raise the issue of systematic exclusion of members of his race by his plea of guilty is a question to be determined from the facts. United States, ex rel. Goldsby vs. Harpole, supra; United States, ex rel. Seals vs. Winan, supra."

The Supreme Court's judgment entered in that case included the following:

Opinion, Tennessee Court of Criminal Appeals

"This cause coming on to be heard upon a transcript of the record from the Criminal Court of Davidson County, assignments of error and reply brief, upon consideration whereof the Court is of opinion that in the judgment of the Court below there is error in that an evidentiary hearing was not granted plaintiff in error on the question of systematic exclusion of Negroes from the grand and petit juries in Davidson County at the time of plaintiff in error's indictment and trial."

Of course, we may take judicial notice of prior proceedings by the same petitioner. State ex rel. Wilkerson v. Bomar, 213 Tenn. 499, 376 S.W.2d 451.

After the remand the present petition was filed, the petitioner and appointed counsel evidently preferring to make a new start in view of the Court's language about appointing counsel to assist the petitioner in preparation of a factual petition. This case is now before us upon appeal from the trial court's judgment dismissing that petition following an evidentiary hearing as directed by the Supreme Court. Upon the evidence introduced at that hearing there can be no doubt whatever that Negroes were deliberately and systematically excluded from the Grand Jury which returned the indictment against this petitioner, at the February 1948 Term of the Davidson County Criminal Court. He testified that at the time of his trial he was 20 years of age and was represented by an attorney employed by his mother; that he did not at that time have any knowledge concerning the methods of selecting people to serve on the grand or petit juries, or concerning his rights; that his attorney never talked to him about those matters or advised him concerning his rights to a properly constituted Grand Jury and petit jury; and that no Negroes were included in the Grand Jury which indicted him.

The judge who presided at Henderson's original trial, who served as a Criminal Judge in Davidson County from September 1, 1922 until his retirement on August 31, 1958, was called as a witness by the petitioner. He testified that he never placed a Negro on the Grand Jury, notwithstanding Negroes were called for jury duty; that the first Negro to serve on a Grand Jury during his tenure was Dr. H. H. Walker; that in 1947 the Legislature changed the jury law of Davidson County (Chapter 53, Private Acts of 1947) and that the new jury law did not limit the judges of the Criminal Court to the jury list furnished by the Jury Commission; that "Some of them[Negroes in the jury box] wouldn't come, [when summoned] and some of them that did come didn't want to serve and some that came in, they had a job, and just the two dollars a day was a hardship and they asked to be let off, because they had families and things of that kind, and I felt it was my duty to let blacks off ff it was injurious to them making a living." Of course, he was referring to Section 7 of the Chapter 53 of the Acts of 1947 which provided, among other things, that in selecting the Grand Juries, the Criminal Court Judges were not confined to the jury list and were permitted to select members of the Grand Jury from the County at large. "* * * and the judges could select whomever they thought would make good grand jurors, and we were not in any way, as I recall, limited in our judgment on the matter. We could use our best judgment." "Sometimes, when I would get the jury list, if I found people on there that I thought would make good grand jurors, I selected some from there. I used my own judgment as to what I thought would be the best panel of jurors that I could get." "It wasn't a question of whether he was black or white. As I said a while ago, I selected grand juries that I thought would give everybody a fair deal all the way through and a grand jury that if I

was charged, I would have wanted to pass on mine." Asked whether he generally selected persons whom he knew, the judge said, "Well, I knew them, or knew of them. I wouldn't say I knew everybody on the grand jury before I put them on, but I had information about them, what kind of people they were, before they went on the grand jury. I didn't select anybody at random for the grand jury." He testified that he and the other Criminal Judge of the County alternated in selecting the Grand Juries.

The record shows that Dr. H. H. Walker, referred to by the judge who presided at the petitioner's original trial as the first Negro who served on the Grand Jury during his tenure as Criminal Judge served on the Grand Jury empaneled for the May Term of 1953, more than five years after the petitioner was indicted. This record also shows that during the years from 1940 to 1950, approximately 25 per cent of the Davidson County population over 21 years of age was non-White.

The former District Attorney General of Davidson County, testifying as a witness for the petitioner, said that during the period from 1940 to 1955 he worked with the Grand Juries of the County and that Dr. Walker was the first Negro to serve on a Grand Jury during that period.

The petitioner introduced an affidavit of his original trial counsel, in which that attorney stated that he had no knowledge that members of the petitioner's race had been systematically excluded from service on the grand and petit juries of Davidson County or from those involved in the petitioner's indictment and trial, and that he had no occasion to advise the petitioner concerning the composition or method of selection of people for grand and petit jury service, nor concerning his rights in such matters.

Manifestly, this record, showing that no Negro served on a Grand Jury in Davidson County from September 1922 until the May Term of 1953, which was long after Henderson's indictment, positively establishes a prima facie case of proscribed exclusion of members of Henderson's race. The State made no attempt to rebut the prima facie case thus established.

The judge who heard this petition based his judgment of dismissal solely upon his conclusions and findings that "* * * there is absolutely no showing in the record before us that any segment of the community has been systematically or deliberately excluded by reason of race or color and we, therefore, conclude that there is no proof to establish the allegations of the petition and it must necessarily be dismissed." In arriving at that conclusion the court also said:

> "While the legal question of waiver raised by the answer of the respondent could well be a valid one, the issue was not resolved on that question but an evidentiary hearing was had and the decision rests on the result of that hearing. The question is was there a systematic exclusion of Negroes from both grand and petit juries which violated his constitutional rights."

In my opinion the evidence adduced at the hearing upon this petition concerning the composition of the Davidson County Grand Juries from 1922 until May of 1953, does not sustain the conclusions and findings of the trial judge. As I view it, the uncontroverted evidence conclusively demonstrates that Negroes were systematically and purposefully excluded from serving on the Grand Juries of Davidson County. With the adult Negro population being what it was, no other explanation is apparent from this record for completely omitting them from Grand Jury

membership over such a long period of time. It would seem strange indeed that the judges, who had responsibility for selecting the Grand Jurors, could find no Negroes worthy of serving on a Grand Jury, and to whom such service would not have been an extraordinary economic hardship. The Supreme Court of the United States has held that the "indisputable fact that no Negro had served on a criminal court grand or petit jury for a period of thirty years created a very strong showing that during that period Negroes were systematically excluded from jury service because of race. *** [imposing a duty on the State] to try to justify such an exclusion as having been brought about for some reason other than racial discrimination." Patton v. State of Mississippi, 332 U.S. 463, 466, 68 S. Ct. 184, 186, 92 L. Ed. 76

It is fundamental that systematic exclusion of Negroes from Grand Jury service because of their race violates the Fourteenth Amendment of the United States Constitution. Patton v. State of Mississippi, supra, and cases there cited. In Reece v. State of Georgia, 350 U.S. 85, 76 S. Ct. 167, 100 L. Ed. 77, the Court said:

> "This Court over the past 50 years has adhered to the view that valid grand jury selection is a constitutionally protected right. The indictment of a defendant by a grand-jury from which members of his race have been systematically excluded is a *denial of his right to equal protection of the laws.*" (Emphasis supplied)

And in Eubanks v. Louisiana, 356 U.S. 584, 78 S. Ct. 970, 2 L. Ed. 2d 991, wherein systematic exclusion of Negroes from Grand Jury duty was established, the Court said:

> "In an unbroken line of cases stretching back almost 80 years this Court has held that a criminal defendant is

denied the equal protection of the laws guaranteed by the Fourteenth Amendment if he is indicted by a grand jury *or* tried by a petit jury from which members of his race have been excluded because of their race.

* * *

"In Patton v. State of Mississippi, 332 U.S. 463, 469, 68 S. Ct. 184, 187, 92 L. Ed. 76, this Court declared, in a unanimous opinion, that 'When a jury selection plan, whatever it is, operates in such way as always to result in *the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group*, indictments *and* verdicts returned against them by juries thus selected cannot stand.' This is essentially the situation here. *True, the judges now serving on the local court testified generally that they had not discriminated against Negroes in choosing grand juries, and had only tried to pick the best available jurors.* But as Chief Justice Hughes said for the Court in Norris v. State of Alabama, 294 U.S. 587, 598, 55 S. Ct. 579, 584, 79 L. Ed. 1074, *'If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the Equal Protection Clause —adopted with special reference to their protection— would be but a vain and illusory requirement.'* Compare Reece v. State of Georgia, 350 U.S. 85, 88, 76 S. Ct. 167, 169, 100 L. Ed. 77; Hernandez v. State of Texas, 347 U.S. 475, 481, 74 S. Ct. 667, 671, 98 L. Ed. 866. This is particularly true here where several of the parish judges apparently have never even interviewed a Negro in selecting grand jurors.

We are reluctantly forced to conclude that the uniform and long-continued exclusion of Negroes from grand juries shown by this record cannot be atributed to chance, to accident, or to the fact that no sufficiently qualified Negroes have ever been included in the lists submitted to the various local judges. It seems clear to us that Negroes have been consistently barred from jury service because of their race." (Emphasis supplied.)

So, it is no longer open to question or debatable that a Grand Jury racially segregated systematically and deliberately by excluding members of a race is unconstitutionally constitu and void insofar as proceedings against members of the excluded race are concerned. And it is equally incontestable that an indictment against a member of the excluded race by such an unconstitutional Grand Jury is likewise unconstitutional and void. It could not possibly be otherwise. Obviou a racially unconstitutional Grand Jury is impotent and incompetent to return a valid indictment against a member of the race whose systematic exclusion therefrom renders it unconstitutional as to them. "Therefore, it necessarily follows that the indictment of a Negro defendant by a grand jury in a state court from which members of his race have been intentionally excluded solely because of their race is not good, for the reason that as to such Negro defendant it is not a legal grand jury. ***" State v. Covington, 258 N.C. 501, 128 S.E.2d 827. See also State ex rel. Hathaway v. Henderson, Tenn. Cr. App., 432 S.W.2d 503.

The majority opinion completely bypasses and ignores the question of systematic exclusion of Negroes from the Grand Jury which returned the indictment against the petitioner. Instead, that opinion is predicated wholly upon the proposition that the petitioner is now estopped to raise that question, on the theory that he waived the compos

of the Grand Jury by entering a plea of guilty and by not raising the question before he went to trial. However, the clear implication of the majority's position is that systematic exclusion of Negroes from Grand Jury service in Davidson County is considered to have been a fact.

It is easy in situations of this kind to lose sight of the real issue when the question concerns the racial composition of the Grand Jury. The determinative issue in such cases, as in this case, is not simply the illegal composition of the Grand Jury, per se, because Negroes were systematically and deliberately excluded therefrom. But rather, the presiding and decisive question is whether the indictment returned against a member of the excluded race by such a racially segregated Grand Jury was void and constituted no legal basis for a valid prosecution.

Inasmuch as the majority opinion is rested solely upon the proposition that by pleading guilty and not raising the question before going to trial, the defendant waived the composition of the Grand Jury and is now precluded from complaining collaterally about those matters, it is necessary to consider the waiver question.

In Shepard v. Henderson, Tenn. Cr. App., 449 S.W.2d 726, we reiterated the firmly established rule of law that a plea of guilty, understandingly and voluntarily entered on the advice of counsel, constitutes an admission of all facts alleged and a waiver of all *non-jurisdictional* and procedural defects and constitutional infirmities, if any, in any prior stage of the proceeding.

But an indictment is jurisdictional. "A lawful accusation is an essential element of a common-law trial by jury, either upon indictment for felonies and capital offenses or by information for misdemeanors. Such an accusation is jurisdictional;

without it there can be no valid prosecution." So said the Supreme Court of this State in State v. Hughes, 212 Tenn. 644, 371 S.W.2d 445, quoting with approval from Wharton's Criminal Law & Procedure (Anderson) Vol. 4, § 1724, at page 506.

"A valid warrant or indictment is an essential of jurisdiction." State v. Covington, 258 N.C. 501, 128 S.E.2d 827. "A valid indictment returned by a legally constituted grand jury is a jurisdictional requirement." Gibbons v. Territory, 5 Okl. Cr. 212, 115 P. 129.

Such is the general law. In 22 C.J.S. Criminal Law §143, pp. 379-380 the rule is thus stated:

> "Jurisdiction to try and punish for a crime cannot be acquired by the mere assertion of it, or invoked otherwise than in the mode prescribed by law, and if it is not so acquired or invoked any judgment is a nullity.
>
> Ordinarily, a formal accusation, which charges some offense known to law, is essential for every trial for crime, without which the court acquires no jurisdiction to proceed, even with the consent of accused, see infra § 147, and where the law requires a particular form of accusation, that form of accusation is essential. ***
>
> "Jurisdiction to try offenses is ordinarily acquired by an indictment, or in some jurisdictions by an information, and *where the indictment or information is invalid the court is without jurisdiction*." (Emphasis supplied.)

And it is said in 22 C.J.S. Criminal Law § 147, pp. 393-396:

> "Since jurisdiction of an offense or its subject matter must be conferred by law, it is usually held, as a general rule, that jurisdiction to take cognizance of an offense

or to render a particular judgment cannot be conferred solely on a court by the consent of accused, either express or inferential, or by any fiction of presumption, waiver, or estoppel.

* * *

"By pleading guilty or not guilty to an accusation of a crime of which the court has jurisdiction, jurisdiction of the person is conferred on such court; but this is not so as to an offense of which the court has no jurisdiction."

22 C.J.S. Criminal Law § 162, p. 421 states the rule in this language:

"Generally, where accused pleads to the merits of the action, he waives all objections with respect to the court's jurisdiction of his *person*. So, the objection that the court has no jurisdiction of the *person of accused*, whether by reason of some irregularity in the proceedings, or because of some defect in the constitution of the court which does not prevent it from being a de facto court, or for other reasons, is waived by accused pleading not guilty and going to trial, or by pleading guilty, unless accused is properly permitted to withdraw his plea. *However, the objection that the court does not have jurisdiction of the offense or subject matter is not waived by a plea or going to trial, and may be asserted at any time.*" (Emphasis supplied.)

A further statement of the rule is found in 27 Am. Jur., Indictments & Informations, § 187, p. 731-732:

"It is the general rule that defects or omissions in the indictment or in the mode of finding the indictment, *which are of such a fundamental character as to make*

the indictment wholly invalid, are not subject to waiver by the accused. Such fundamental defects or omissions are not waived by failure to raise them by preliminary motion or plea or in some other appropriate manner during the trial or by pleading to the merits." (Emphasis supplied.)

There is a clear and well-defined distinction, frequently lost sight of, between those indictments containing mere irregularities or deficiencies and those that are wholly void. This distinction between the voidable and the void was expressly recognized by our Supreme Court in Robinson v. City of Memphis, 197 Tenn. 598, 277 S.W.2d 341, wherein the Court said:

"The probability is that the trial judge thought that the objection to the warrant came too late, since it was not made until after the entry of judgment. In taking that view of the matter, if he did, the trial judge inadvertently failed, as we sometimes do, to draw the distinction between that which is void, on the one hand, and, on the other hand, that which is voidable only."

In State v. Covington, supra, the Negro defendant was convicted upon his pleas of guilty on indictments which he had previously moved unsuccessfully to quash on account of asserted intentional exclusion of Negroes from the Grand Jury. The defendant moved to quash the three indictments involved before pleading, as required by a State statute providing, in substance, that such objections to an indictment based on defects and irregularities in the drawing or organization of the Grand Jury must be made by motion to quash the indictment before the jury is sworn and empaneled to try the issue. Reversing, the Supreme Court of North Carolina said:

There is abundant authority that *a plea of guilty does not waive a jurisdictional defect*. Weir v. United States, 7th Cir., 92 F.2d 634, 114 A.L.R. 481; People v. Green, 368 Ill. 242, 13 N.E.2d 278, 115 A.L.R. 348; Berg v. United States, 9th Cir., 176 F.2d 122; 22 C.J.S. Criminal Law § 424(7); ibid., § 162; 4 Wharton's Criminal Law and Procedure, by Ronald A. Anderson, § 1901, p. 770. See People v. Green, 329 Ill. 576, 161 N.E. 83.

* * *

"Courts indulge every reasonable presumption against a waiver by a defendant charged with crime of fundamental constitutional rights, and do not presume acquiescence in their loss. Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed. 680; Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357; Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 57 S. Ct. 809, 81 L. Ed. 1177; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093.

In Johnson v. Zerbst, supra, the Court said, 'A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.'

"* * * Under these circumstances, it is our opinion, and we so hold, *defendant, by his subsequent pleas of guilty in each case, has not waived his objection to the grand jury which indicted him on the ground that it was illegally impanelled and composed in violation of his fundamental constitutional rights, and on the ground that because of a fundamental constitutional prohibition the grand jury was without jurisdiction to find valid indictments against him, a Negro.*" (Emphasis supplied.)

The general rule is well settled in this State that mere irregularities, deficiencies and defects *in otherwise valid indictments* are waived by going to trial without raising objection thereto. Allen v. State, 199 Tenn. 569, 288 S.W.2d 439; Jones v. State, 197 Tenn. 667, 277 S.W.2d 371; Driscoll v. State, 191 Tenn. 186, 232 S.W.2d 28; Johnson v. State, 187 Tenn. 438, 215 S.W.2d 816; Estep v. State, 183 Tenn. 325, 192 S.W.2d 706; Erby v. State, 181 Tenn. 647, 184 S.W.2d 14; Blackman v. State, 169 Tenn. 197, 83 S.W.2d 899; French v. State, 159 Tenn. 451, 19 S.W.2d 276; State ex rel. Scroggins v. Rice, 159 Tenn. 473, 19 S.W.2d 227; Pope v. State, 149 Tenn. 176, 258 S.W.775; Palmer v. State, 121 Tenn. 465, 118 S.W. 1022; Whim v. State, 117 Tenn. 94, 94 S.W. 674; State ex rel. Lawrence v. Henderson, Tenn.Cr.App., 433 S.W.2d 96, 101, cited in the majority opinion, wherein the petitioner's only complaint with respect to the juries was that he did not receive a copy of the indictment or one of the Grand Jury panel, neither of which he made any request for.

However, it is to be noted that in none of the foregoing cases, nor in any other as far as I can ascertain, has our Supreme Court said that a void indictment is waived by failure to object on that ground before entering a plea, or that, absent such a preliminary challenge, a void indictment is cured by a verdict of guilty. To so hold would be an abrogation of the cardinal constitutional principle that a lawful accusation is an essential jurisdictional element of a criminal trial, without which there can be no valid prosecution. State v. Hughes, supra; State v. Covington, supra; Gibbons v. Territory, supra, and the other authorities above quoted.

In Cobb v. Balkcom, 339 F.2d 95, 101-102 (5th Cir. 1964) these significant statements were made:

"In summary, then, the prior decisions of this court have established three situations, all capital cases, in which a state criminal defendant's failure to object to jury composition will not constitute a waiver barring relief on federal habeas corpus. If defendant's counsel fails to consult with him concerning his rights (Harpole) [United States ex rel. Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959), cert. den. 361 U.S. 838, 80 S. Ct. 58, 4 L. Ed. 2d 78], or where there is failure to consult plus the fact that the evidence of systematic exclusion is neither known nor easily ascertainable at the time of trial (Wiman) [United States ex rel. Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962), cert. den. 372 U.S. 915, 83 S. Ct. 717, 9 L. Ed. 2d 722], or where the defendant or his counsel failed to object through fear of engendering hostility (Whitus) [Whitus v. Balkcom, 333 F.2d 496 (5th Cir. 1964)], there is no valid waiver. In Harpole the waiver was ineffective as to the trial jury, but the plus facts of Wiman and Whitus made the waiver ineffective as to both juries.

"We think this case is controlled by Harpole. Trial counsel did not discuss the right with Cobb or his mother or anyone acting for Cobb. There was no express waiver by Cobb either of his right to challenge the grand jury indictment or the trial jury. His lawyer was satisfied with the grand and trial juries, but this is insufficient. Moreover, considering Cobb's age and inexperience, the fact that he never had a lawyer until after indictment, and the known illegal composition of the grand jury, we feel that Harpole should be extended to cover the grand jury in the present case. In sum, there was no intentional

relinquishment of a known right within the purview of the majority opinion in Fay v. Noia [372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837], and for the state to subject a defendant to this situation amounts to a denial of due process and equal protection of the laws guaranteed by the Fourteenth Amendment. What constitutes a valid waiver in this instance is a federal question, and with all deference to the Supreme Court of Georgia, we hold that Cobb's federal rights were not abandoned."

See also: Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966), and McNeil v. State of North Carolina, 368 F.2d 313 (4th Cir. 1966) on subject of waiver in state court.

Moreover, the rule that habeas corpus is not available to test the sufficiency of indictments (Knewel v. Egan, 268 U.S. 442, 446, 45 S. Ct. 522, 69 L. Ed. 1036; Underwood v. Bomar, 335 F.2d 783 (6th Cir. 1964), cert. den. 380 U.S. 921, 85 S. Ct. 917, 13 L. Ed. 2d 805; State ex rel. Carroll v. Henderson, Tenn. Cr. App., 443 S.W.2d 689), is not a mechanical one. When an indictment is so fatally defective as to deprive the court of jurisdiction it may be reviewed in habeas corpus proceedings. McCoy v. Pescor, 145 F.2d 260 (8th Cir. 1944), cert. den. 324 U.S. 868, 65 S. Ct. 911, 89 L. Ed. 1423, rehearing denied 325 U.S. 891, 65 S. Ct. 1083, 89 L. Ed. 2004; Knight v. Hudspeth, 112 F.2d 137 (10th Cir. 1940), cert. den. 311 U.S. 681, 61 S. Ct. 62, 85 L. Ed. 439, In State ex rel. Smith v. Johnson, 220 Tenn. 49, 413 S.W.2d 694, the indictment was attacked in a habeas corpus petition on the same basis as in the present case and our Supreme Court did not once intimate any belief that the question is not reviewable by habeas corpus.

So, the reason our Supreme Court reversed the trial court and remanded this petitioner's preceding identical

petition for an evidentiary hearing clearly appears. That Court certainly recognized that these questions are not waived in this State by failure to raise them before going to trial, and that they may be raised and determined in post-conviction proceedings. Had the Court thought otherwise, an evidentiary hearing patently would have been a futulity and would not have been ordered, for the simple reason that such a hearing would not have been necessary if the questions presented were waived by the petitioner's failure to raise them prior to going to trial, and the Court would have simply affirmed the trial court's judgment dismissing the case without an evidentiary hearing. The above-quoted language employed by our Supreme Court in remanding the case for an evidentiary hearing demonstrates that the Court was fully cognizant that under established principles of law the petitioner's conviction and sentence were constitutionally void if he was tried and convicted upon a void indictment.

Bustillo v. United States, 5 Cir., 421 F.2d 131, 132 and Jackson v. United States, 5 Cir., 394 F.2d 114, cited in the majority opinion, invoke statutory federal rules of criminal procedure imposing definite time limitations within which exceptions to Grand Jurors on account of their disqualifications and indictments returned by allegedly invalid Grand Juries may be raised, and providing that unless raised within the prescribed time such objections are waived. Hayes v. Wainwright, D.C., 302 F. Supp. 716 (apparently predicated upon the same federal rules because Jackson v. United States, supra, is cited as authority for the Court's holding) is also cited in the majority opinion. Some states have similar statutes. See State v. Covington, supra, and State v. Wilson, 204 La. 24, 14 So. 2d 873, appeal dism. 320 U.S. 714, 64 S. Ct. 202, 88 L. Ed. 419: There is

no such statutory time limitation in this State, and, consequently, cases involving such restrictive statutory rules are inapplicable and offer no assistance in the resolution of the question before us in this case. Rather, the Supreme Court of Tennessee has promulgated the variable standard that objections to the Grand Jury or its proceedings must be raised at the first opportunity. Turner et al. v. State, 187 Tenn. 309, 213 S.W.2d 281; Bonds v. State, 220 Tenn. 555, 421 S.W.2d 87.

The authorities hereinabove cited make it abundantly clear that no waiver is or can be imputed to one whose criminal conviction and sentence is unquestionably void. Extensive research has not disclosed a case in which any court has denied relief sought collaterally where the conviction and sentence appeared indisputably and conclusively void. Due process and equal protection of law, preserved for all by our Constitution, command that no such practice as that disclosed by this record shall be resorted to or permitted to consign any person to prison upon a void conviction.

In Coppedge v. United States, 369 U.S. 438, 449, 82 S. Ct. 917, 923, 8 L. Ed. 2d 21, the United States Supreme Court said this:

> "* * * When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged."

For this Court, or any court, to approve and thus condone the gross and patent injustice of imprisoning a man upon a constitutionally void conviction and sentence, upon the theory that he waived his rights by not speaking up in time, is to substitute diaphanous fiction for fact and to say that justice hangs by a gossamer strand, or indeed that it is only an illusion—a mirage in the distance.

It hardly needs to be said that we should not turn a deaf ear to the petitioner's complaint and close our eyes to the fact that his conviction and sentence are constitutionally void simply because he waited in prison more than 20 years to voice his protest.

In my view, the judgment should be reversed and this petition should be sustained. This does not mean that the petitioner must necessarily go free. For indictments can be returned and trials can be had by juries selected as the Constitution commands. Patton v. State of Mississippi, 332 U.S. 463, 68 S. Ct. 184, 187, 92 L. Ed. 76.

It should be noted in passing that the opinion of this Court in Doyle v. State, cited in the majority opinion, affirming the dismissal, without an evidentiary hearing, of a post-conviction petition containing substantially the same allegations as does the present petition, is directly contrary to the above-quoted November 3, 1967 opinion of the Supreme Court of Tennessee holding that an evidentiary hearing is required when such allegations are made in a post-conviction petition.